Supreme Court, U.S.
FILED

091316 APR 26 2010

OFFICE OF THE CLERK
William K. Suter, Clerk

No. _____

In The
Supreme Court of the United States

TRACY BROWN,
Petitioner

v.

JEFFREY MARK OLSON,
Respondent

On Petition for a Writ of Certiorari
To the United States Court of Appeals
for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

Douglas J. Masson
Counsel of Record for Petitioner
P.O. Box 99
Lafayette, Indiana 47902
(765) 423-5404
djm@hlblaw.com

LEGAL PRINTERS LLC, Washington DC • 202-747-2400 • legalprinters.com

QUESTION PRESENTED

Does a claim for injunctive relief become moot and subject to dismissal under Article III, §2 of the United States Constitution when a putative class representative loses his personal stake after filing a complaint but before class certification where the claims of the putative class typically endure for one hundred thirty-nine (139) days and, not uncommonly, over a year notwithstanding uncertainty at the time the claim is filed as to when the claim of any particular class member might expire, or is the claim saved as "inherently transitory" under *Gerstein v. Pugh*, 420 U.S. 103 (1975) and its progeny?

LIST OF PARTIES

The parties to the proceeding below were defendant/petitioner Tracy Brown, in his official capacity as Sheriff of Tippecanoe County, Indiana, and plaintiff/respondent Jeffrey Olson, on behalf of himself and a class of those similarly situated.

TABLE OF CONTENTS

QUESTION PRESENTED i
LIST OF PARTIES ii
TABLE OF CONTENTS iii
TABLE OF APPENDICES v
TABLE OF CITED AUTHORITIES vi
OPINIONS BELOW 1
STATEMENT OF JURISDICTION 1
CONSTITUTIONAL PROVISIONS INVOLVED 1
STATEMENT OF THE CASE 2
REASONS TO GRANT THE PETITION 5

I. The Seventh Circuit's decision expands the "inherently transitory" mootness exception to include claims which are only potentially transitory. 5

II. Unlike the Seventh Circuit, this Court has not recognized uncertainty of a claim's duration at the inception of a particular claimant's lawsuit as the essence of the "inherently transitory" mootness exception. Rather, it is the nature of the class claim generally which must be transitory to qualify for the exception. 7

III. The Seventh Circuit's ruling deepens a split in the circuits. The Second, Third, Seventh, and Tenth Circuits would likely allow Mr. Olson's suit to proceed whereas the First, Fourth, Fifth, Eighth, and Ninth likely would not. 12

A. Jurisdictions consistent with the Seventh Circuit decision 12

B. Jurisdictions inconsistent with the Seventh Circuit decision 14

CONCLUSION 19

TABLE OF APPENDICES

Appendix A - Opinion of the United States Court of Appeals for the Seventh Circuit, Decided February 4, 2010 ..... App. 1

Appendix B - Memorandum Opinion and Order of the United States District Court for the Northern District of Indiana, June 22, 2009 ..... App. 14

Table of Cited Authorities

CASES

Alvarez v. Smith, __ U.S. ___; 130 S.Ct. 576 (2009) 6, 11

Board of School Com'rs of City of Indianapolis v. Jacobs, 420 U.S. 128 (1975) 9

Clay v. Miller, 626 F.2d 345 (4th Cir. 1980) 18

Comer v. Cisneros, 37 F.3d 775 (2d Cir. 1994) 13

County of Riverside v. McLaughlin, 500 U.S. 44 (1991) 6, 8

Cruz v. Farquharson, 252 F.3d 530 (1st Cir. 2001) .. 14-15

Deposit Guaranty Nat. Bank v. Roper, 445 U.S. 326 (1980) 9

Gerstein v. Pugh, 420 U.S. 103 (1975) ..... *passim*

Holmes v. Pension Plan of Bethlehem Steel Corporation, 213 F.3d 124 (3d Cir. 2000) 13

Honig v. Doe, 484 U.S. 305 (1988) 5

Inmates of Lincoln Intake and Detention Center v. Boosalis, 705 F.2d 1021 (8th Cir. 1983) 16-17

Kirkland v. Wade, 118 F.3d 667 (9th Cir. 1997) 17

Liner v. Jafco, 375 U.S. 301 (1964) 5

Lusardi v. Xerox Corporation, 975 F.2d 964 (3d Cir. 1992) 13

Milonas v. Williams, 691 F.2d 931 (10th Cir. 1982) 14

Olson v. Brown, 594 F.3d 577 (7th Cir. 2010) .... *passim*

Oregon Advocacy Center v. Mink, 322 F.3d 1101 (9th Cir. 2003) 18

Rocky v. King, 900 F.2d 864 (5th Cir. 1990) 15-16

Rosetti v. Shalala, 12 F.3d 1216 (3d Cir. 1993) 13

Sosna v. Iowa, 419 U.S. 393 (1974) ..... *passim*

Swisher v. Brady, 438 U.S. 204 (1976) 8-9

U.S. Parole Commission v. Geraghty, 445 U.S. 388 (1980) 9, 14, 18

Weinstein v. Bradford, 423 U.S. 147 (1975) 9

Wilkerson v. Bowen, 828 F.2d 117 (3d Cir. 1987) 13

Zurak v. Reagan, 550 F.2d 86 (2d Cir. 1977) 12-13

CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. Const. Art. III, §2 ..... 1, 5, 18

28 USC 1254 1

28 USC 1291 4

28 USC 1331 4

28 USC 1367 4

28 USC 1441 4

28 USC 1446 4

42 USC 1983 4

Petitioner Tracy Brown, Sheriff of Tippecanoe County, Indiana, respectfully petitions for a writ of certiorari to review the opinion and decision of the United States Circuit Court for the Seventh Circuit filed on February 4, 2010.

OPINIONS BELOW

The United States Court of Appeals for the Seventh Circuit reversed the decision of the United States District Court for the Northern District of Indiana dismissing Respondent's claim as moot. The Seventh Circuit's opinion is reported at 594 F.3d 577 (7th Cir. 2010) and is reprinted in the appendix hereto at App. 1. The district court's order dismissing Respondent's claim as moot is available at 2009 WL 1766667 (N.D. Ind. 2009) and is reprinted in the appendix hereto at App. 14.

STATEMENT OF JURISDICTION

The opinion of the United States Court of Appeals for the Seventh Circuit for which Petitioner seeks review was issued February 4, 2010. This petition was timely filed within 90 days of the February 4, 2010 decision. The jurisdiction of this Court to review the decision of the Court of Appeals is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. Art. III, §2 provides in relevant part:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this

> Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; to all Cases affecting Ambassadors, other public Ministers and Consuls; to all Cases of admiralty and maritime Jurisdiction; to Controversies to which the United States shall be a Party; to Controversies between two or more States; between a State and Citizens of another State; between Citizens of different States; between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

STATEMENT OF THE CASE

Respondent Jeffrey Mark Olson was a prisoner of the Indiana Department of Correction who was being held at the Tippecanoe County Jail for the 139 day period between August 29, 2008 and January 15, 2009. Petitioner Tracy Brown is the Sheriff of Tippecanoe County, Indiana and is responsible for the conditions at the Tippecanoe County Jail.

On January 2, 2009, while still incarcerated at the Tippecanoe County Jail, Mr. Olson filed his complaint seeking only injunctive relief with respect to alleged policies and practices at the Tippecanoe County Jail that, according to him, violated his rights under the United States Constitution and Indiana state law. With his Complaint, Mr. Olson filed a motion for certification of a class consisting of current and future persons incarcerated at the Tippecanoe County Jail. At a given time, the jail population consists of

approximately 529 inmates with an average stay of 139 days. On February 20, 2009, 128 of the inmates had been in the jail for less than 30 days; 119 had been in the jail for between 30 and 90 days; 130 had been in the jail for between 90 and 180 days; 121 had been in the jail for between 180 and 365 days; and 41 had been in the jail for over a year. The parties agreed that this jail population was a representative sample.

On January 15, 2009, the Indiana Department of Correction transferred Mr. Olson out of the Tippecanoe County Jail. On March 13, 2009, Sheriff Brown filed a motion to dismiss under Rule 12(c) of the Rules of Federal Procedure. On March 18, 2009, the district court heard oral argument on the motion for class certification but deferred ruling pending Mr. Olson's response to the motion to dismiss. On June 23, 2009, the district court dismissed Mr. Olson's claim as moot because Mr. Olson lost his personal stake in the litigation prior to class certification and determined that the putative class claim asserted by Mr. Olson was not inherently transitory such that class certification, if granted, would "relate back" to the filing of the Complaint.

Mr. Olson's complaint alleged four basic violations of his rights at the jail: 1) An inadequate grievance process in violation of Indiana law; 2) Inadequate access to a law library in violation of Indiana law; 3) Inspection of his mail from the courts outside of his presence in violation of the First and Fourteenth Amendments to the United States Constitution and Indiana law; and 4) Inspection of his mail from attorneys outside of his presence in violation of the First and Fourteenth Amendments to the United States Constitution and Indiana law. Originally filed in the Tippecanoe Superior

Court 1, the case was removed to the United States District Court for the Northern District of Indiana pursuant to 28 USC 1441 and 1446. The District Court had original jurisdiction of the case under 28 USC 1331 for federal claims that the Sheriff of Tippecanoe County violated Mr. Olson's rights under the First and Fourteenth Amendments to the United States Constitution, actionable under 42 USC 1983. The district court had supplemental jurisdiction of the state law claims under 28 USC 1367.

On appeal, the United States District Court for the Seventh Circuit had jurisdiction under 28 USC 1291. The judgment of June 23, 2009 in the district court disposed of all the issues in the case. Mr. Olson filed his notice of appeal on July 7, 2009. On February 4, 2010, the Seventh Circuit reversed the district court and remanded for consideration of Mr. Olson's motion for class certification and for consideration of Sheriff Brown's motion to dismiss. The Circuit Court's reversal was based on its determination that Mr. Olson's claim was inherently transitory and, therefore, entitled to the exception to the mootness doctrine applied in *Gerstein v. Pugh*, 420 U.S. 103 (1975). The Seventh Circuit reasoned Mr. Olson's claim was "inherently transitory" within the meaning of *Gerstein* because of uncertainty for Mr. Olson or any other inmate about how long his or her particular claim would remain viable, because a named plaintiff's claim might expire before a district court judge has an opportunity to rule on a motion for class certification, and because there is a constant set of inmates subject to the conditions alleged. *Olson v. Brown*, 594 F.3d 577, 582 (7th Cir. 2010) (App. 9) ("While the ultimate length of confinement does affect the applicability of the 'inherently transitory' exception, the essence of the exception is

uncertainty about whether a claim will remain alive for any given plaintiff long enough for a district court to certify the class.")

REASONS TO GRANT THE PETITION

I. The Seventh Circuit's decision expands the "inherently transitory" mootness exception to include claims which are only potentially transitory.

The proper scope of federal jurisdiction is a matter of fundamental importance. The Seventh Circuit's decision expands the authority of a federal court to entertain moot cases beyond what has been previously recognized by the Supreme Court. Furthermore, the Circuit Courts have not been uniform in their application of the "inherently transitory" exception to mootness for putative class actions that have not been certified. The case at hand presents relatively simple and uncontested facts which will allow the Court to squarely address the proper bounds of the exception.

Article III, §2 of the United States Constitution limits the jurisdiction of the federal courts to actual cases or controversies. *Liner v. Jafco*, 375 U.S. 301, 306 fn. 3 (1964). Additionally, the Supreme Court has recognized a prudential doctrine of mootness which limits a court's authority to maintain jurisdiction over a case in which the controversy is no longer "live." *See Honig v. Doe*, 484 U.S. 305, 330 (1988) (Rehnquist, C.J. concurring). As a practical matter, in claims for injunctive relief, this means that a plaintiff cannot seek to enjoin practices or procedures to which the plaintiff is no

longer subject. *Alvarez v. Smith*, __ U.S. ___; 130 S.Ct. 576, 580-581 (2009).

The Supreme Court has carved out a narrow exception for claims that are of such a limited duration that strict application of mootness principles would allow the claims to escape review entirely. In the class action context, this means claims so transitory they will expire before a district court has a reasonable opportunity to rule on class certification; claims that are "inherently transitory." *County of Riverside v. McLaughlin*, 500 U.S. 44, 51-52 (1991).

The Seventh Circuit's ruling in this case, however, expands the exception beyond *inherently* transitory claims to those which are *potentially* transitory. Rather than examining generically the duration of the type of class claim asserted by the plaintiff, the Seventh Circuit focused on the uncertainty faced by any particular claimant at the outset. The facts of this case are relatively simple. On average, an inmate is subject to the policies and practices at the Tippecanoe County Jail for 139 days, and 30% of the inmate population is subject to those policies and procedures for over six months. Forty-one inmates had been in jail for over a year. It is not unreasonable to expect that a district court could rule on a motion for class certification within such time periods. Even if some inmates might be in the jail for shorter durations and unable to obtain class certification prior to his or her case becoming moot, the claim by its inherent nature is not one likely to escape review entirely.

Under the Seventh Circuit's ruling, mere uncertainty of duration at the outset of a particular claim is sufficient to avoid mootness even where, as here, a non-trivial number of

potential claimants have claims that last in excess of a year. The exception swallows the rule. The ruling is contrary to Supreme Court precedent and adds to conflict between the Circuits.

> *II. Unlike the Seventh Circuit, this Court has not recognized uncertainty of a claim's duration at the inception of a particular claimant's lawsuit as the essence of the "inherently transitory" mootness exception. Rather, it is the nature of the class claim generally which must be transitory to qualify for the exception.*

The Seventh Circuit's expansion of the "inherently transitory" exception to mootness goes beyond the scope recognized by this Court. The Court has recognized as "inherently transitory" claims with durations measured in terms of days and weeks, not those which can last for months or even years. The exception was suggested in *Sosna v. Iowa*, 419 U.S. 393 (1974). In that case, the plaintiff was challenging an Iowa statute that required one year's residency in the state before initiating divorce proceedings. The plaintiff, through passage of time, had lost her personal stake after certification of the class, but the Court recognized that, upon certification, the class acquired a legal status of its own. *Id.* at 399. However, the Court went on to recognize the possibility that class certification could be deemed to "relate back" to the filing of the complaint where the claim becomes moot as to the class representative before a district court can reasonably be expected to rule on the motion for class certification and where the issue raised by the claim would otherwise evade review. *Id.* at 402.

In the case of *Gerstein v. Pugh*, this Court applied, at least hypothetically, the relation back suggested by *Sosna* in the context of a class of Florida prisoners claiming a constitutional right to a judicial hearing on the issue of probable cause for pretrial detention. Under the Florida scheme, individuals could be incarcerated on a prosecutor's information without any kind of judicial hearing for approximately a month before any sort of judicial hearing. 420 U.S. at 106. The application was possibly hypothetical because the Court stated that the record did not reflect whether or not any of the named plaintiffs retained a personal stake in the litigation until the time of class certification. Even assuming they did not, however, the Court said the case would be a suitable exception to the requirement that a named plaintiff retain a personal stake until class certification because it was uncertain if any individual would remain in custody long enough for a district court judge to certify a class and there was a constant class of individuals suffering the deprivation. *Id.* at 111, fn. 11.

The Court has not expanded the exception since the *Gerstein* case. In a similar pretrial detention case, *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991), relation back of an inherently transitory claim was deemed appropriate for prisoners held up to seven days without a probable cause determination. The Court also noted the applicability of the "inherently transitory" exception in a case involving Double Jeopardy questions about a Maryland procedure for juvenile proceedings. Under the procedures, the juveniles' case would initially be heard by a master. However, within a period of 30 days, the possibility existed for a trial court to take action against the juvenile which was contrary to and less favorable than the action recommended by the master.

Swisher v. Brady, 438 U.S. 204, 211 fn. 9, 213 fn. 11 (1976).

Additionally, the Court has clarified that a putative class representative whose request for class certification is denied while he or she still has a live claim that expires thereafter, retains a personal stake in appellate review of the procedural question of class certification. *U.S. Parole Commission v. Geraghty*, 445 U.S. 388, 404 fn. 11 (1980).

By contrast, in a suit for injunctive relief with respect to publication rules for a student newspaper, where a class of high school students was certified without proper attention to detail, the Court held that the ineffective class certification was not enough to save the claim from mootness where the named plaintiffs graduated. *Board of School Com'rs of City of Indianapolis v. Jacobs*, 420 U.S. 128, 129 (1975). *See also, Weinstein v. Bradford,* 423 U.S. 147 (1975) (Dismissing as moot inmate challenge to parole procedures where district court declined to certify class and inmate was fully paroled prior to completion of appeal.)

Eroding the case or controversy requirement, as the Seventh Circuit decision does, moves further along the path to the use of the federal courts for "concerned bystander" and "client-less" litigation warned of in dissent by Justice Powell. *U.S. Parole Commission v. Geraghty*, 445 U.S. at 412-413 (joined in dissent by Justices Burger, Rehnquist, and Stewart); *Deposit Guaranty Nat. Bank v. Roper*, 445 U.S. 326, 353 (1980). In the present case, the Seventh Circuit forgives Mr. Olson the lack of his personal stake with respect to alleged practices at the Tippecanoe County Jail without regard to the fact that, generically, such claims will last, on average, 139 days and, in a non-trivial number of cases, in

excess of a year. These are time frames which permit a district court to rule on class certification, particularly if properly notified about the urgency for such a ruling.

The Seventh Circuit's rationale for deeming Mr. Olson's lack of a personal stake inconsequential to exercise of federal jurisdiction is that there are others like him and none of them can be certain when their particular claim will expire. *Olson v. Brown*, 594 F.3d at 582-583 (App. 10-11) ("An individual incarcerated in a county jail may be released for a number of reasons that he cannot anticipate. . . . This uncertainty is precisely what makes the 'inherently transitory' exception applicable in this case.") The Seventh Circuit errs by analyzing a particular individual's claim instead of the claim generally. Here, given the average duration of the claims in question and that many claims last in excess of a year, it is reasonably possible for a claim to endure at least through class certification even if it might be difficult at the outset to know whose particular claim will last the longest. An exception requiring only that the duration of a claim be uncertain at the outset and the existence of other people with similar claims swallows the rule.

Inmates are not a special case. They may face uncertainty about the future, but they are hardly the only ones. Furthermore, the broadening of the exception is unnecessary to accomplish its goals. The "capable of repetition but evading review" line of exceptions to the mootness doctrine is, as the name suggests, designed to allow courts to address claims of a type that would otherwise evade review because of their perishable nature. *Sosna v. Iowa*, 419 U.S. at 402. A pretrial detention probable cause determination is the classic example. Such detention has a

very real effect on people, but, in cases like *Gerstein* and *County of Riverside*, the claims did not last much more than thirty days and, therefore, absent an exception, there was a very real possibility that a federal court would never be able to address unconstitutional practices in that area, no matter how many detainees tried to bring a claim, because the inherent nature of the claim was so perishable.

By contrast, there is no real danger that the conditions of confinement at the Tippecanoe County Jail would escape review if Mr. Olson's suit is not allowed to proceed. If a representative cross-section of inmates were to bring suit and request class certification, it is not likely that all of their claims would expire before a district court could reasonably be expected to rule on a motion for class certification. At the point the district court dismissed his claim, Mr. Olson was merely a concerned citizen with respect to conditions at the Tippecanoe County Jail. A favorable ruling would not have provided him with any relief. In fact, if the conditions about which he complained were resolved independently of the litigation, he would not have any reason to know or, particularly, to care. His interests now are as a bystander, removed from the ongoing reality of the actual conditions at the Tippecanoe County Jail. As to Mr. Olson, this case is an abstract dispute about the law, unlikely to affect him any more than it affects other citizens. A dispute solely about the meaning of a law, abstracted from any concrete actual or threatened harm, falls outside the scope of the constitutional words "Cases" and "Controversies." *Alvarez v. Smith*, 130 S.Ct. at 580-581.

III. The Seventh Circuit's ruling deepens a split in the circuits. The Second, Third, Seventh, and Tenth Circuits would likely allow Mr. Olson's suit to proceed whereas the First, Fourth, Fifth, Eighth, and Ninth likely would not.

In the wake of *Sosna* and *Gerstein*, the circuits have implemented the inherently transitory exception to the mootness doctrine in conflicting ways. The Second, Third, and, to a lesser extent, Tenth Circuits have recognized approaches that would permit Mr. Olson's claim to go forward. By contrast, the First, Fifth, Eighth and, to a lesser extent, the Fourth, and Ninth Circuits have recognized approaches that likely would not permit Mr. Olson's claim to go forward in those jurisdictions.

A. Jurisdictions consistent with the Seventh Circuit decision

The Seventh Circuit explicitly adopted the expansive approach taken by the Second Circuit in *Zurak v. Reagan*, 550 F.2d 86 (2d Cir. 1977). In *Zurak,* suit was brought on behalf of a class of Riker's Island inmates in New York serving "definite" sentences which were between 90 days and one year. Under New York law, such inmates were permitted to request conditional release after serving 60 days. The subject of their claim was the chaotic procedures associated with a conditional release determination. The class certification motion was unopposed, but for reasons not reflected in the record, the district court waited almost a year to certify the class. By that time, all of the named plaintiffs had been released. The Second Circuit reasoned that mootness was not a problem because the short periods

of incarceration and the possibility of conditional release created a "significant possibility" that any single named plaintiff would be released prior to certification. "Because of the relatively short periods of incarceration involved and the possibility of conditional release, the alleged harm can hardly be redressed while any possible plaintiff is still an inmate." *Id.* at 91-92. The Second Circuit went on to regard as "inherently transitory" claims of racial discrimination and segregation by applicants for federal housing assistance in Erie County, New York. *Comer v. Cisneros*, 37 F.3d 775 (2d Cir. 1994) because the nature of the population of a public housing market is transitory "in some sense" but, especially because the district court failed to rule on a motion for class certification for over two years. *Id.* at 799.

The Third Circuit has also taken an expansive view of the exceptions to the mootness doctrine in proposed class actions, going so far as to state "So long as a class representative has a live claim at the time he moves for class certification, neither a pending motion nor a certified class action need be dismissed if his individual claim subsequently becomes moot." *Holmes v. Pension Plan of Bethlehem Steel Corporation*, 213 F.3d 124, 135 (3d Cir. 2000). However, the Third Circuit has recognized that its approach is not universal and that other circuits have not recognized the mere filing of a motion for class certification as allaying mootness concerns when the motion is pending at the time the named plaintiff loses his or her personal stake in the litigation. *Lusardi v. Xerox Corporation*, 975 F.2d 964, 977 fn 19 (3d Cir. 1992); *Rosetti v. Shalala*, 12 F.3d 1216, 1224-1228 (3d Cir. 1993); *Wilkerson v. Bowen*, 828 F.2d 117, 121 (3d Cir. 1987).

The Tenth Circuit has also taken a position that is somewhat consistent with that of the Second, Third, and Seventh Circuits. Mootness did not bar a proposed class action challenging conditions of detention at a boy's school where the named plaintiffs were removed for their safety shortly after the case was filed and before a class was certified. The Tenth Circuit acknowledged that the district court could not have reasonably been expected to rule on a motion for class certification prior to the boys' removal and, therefore, the exception to mootness noted in *Gerstein* and *Geraghty* were applicable. The court did not examine the nature of the claim generally to determine whether it was of a type that would likely expire for any named plaintiff. That notwithstanding, however, the Tenth Circuit also recognized that the boys had not lost their personal stake at all since the removal of the boys from the school was temporary and they were subject to being returned to the conditions about which they complained. *Milonas v. Williams*, 691 F.2d 931, 937-938 (10th Cir. 1982).

B. Jurisdictions inconsistent with the Seventh Circuit decision

On the opposite side of the divide, the First Circuit has decided that *Gerstein* and its progeny require it to look at the nature of a claim generally and not necessarily the specific circumstances of a named plaintiff's particular case, to determine whether an "inherently transitory" exception is justified. The First Circuit dismissed a claim by plaintiffs challenging the inaction of the Immigration and Naturalization Service in processing claims as moot. Within seventy days of the proposed class complaint, the INS had processed the plaintiffs' applications and given them

favorable determinations. The district court denied the motion for class certification and dismissed the claim as moot. Affirming the district court, the First Circuit observed that "the plaintiffs have not shown at this juncture that the generic types of claims that they seek to pursue are likely to evade review. To do so would necessitate a showing that the claims are inherently transitory." *Cruz v. Farquharson*, 252 F.3d 530, 535 (1st Cir. 2001). Rather than taking the position, as the Seventh Circuit has done, that Plaintiffs claims were transitory because they could not know at the outset when the INS would act on their particular applications; to avoid mootness, the Plaintiffs would have to show that the claims generally could not be expected to endure long enough for a district court to rule on a motion for class certification. *Id.* at 535-536.

Similarly, the Fifth Circuit dismissed a class claim by an inmate of a Louisiana state penitentiary concerning sanitary conditions for inmates performing field work. About five months after the inmate filed a suit for injunctive relief on behalf of himself and those similarly situated, he was removed from the fields by prison officials following an eye surgery. This removal was initially temporary but was eventually made permanent. *Rocky v. King*, 900 F.2d 864, 865 (5th Cir. 1990). The district court declined to rule on whether the claim was moot, instead denying the inmate's motion for class certification and entering summary judgment on the merits. The Fifth Circuit, recognizing mootness as a threshold matter, reversed the district court's entry of summary judgment on the merits and remanded the case for dismissal as moot. The uncertainty of the duration of Rocky's particular claim did not cause the Fifth Circuit to regard class certification as relating back to the filing of the

complaint. Instead, the court noted the existence of a sufficient number of inmates who worked in the fields for periods long enough to enable a district court to rule on a motion for class certification. "Hundreds of inmates at Angola apparently work in the fields and could file a claim identical to that filed by Rocky. There is no indication that Angola officials will remove such inmates from field work before a district court rules on class certification in order to render that claim moot." *Id.* at 870-871. The Fifth Circuit regarded the situation at the penitentiary as self-regulating against an intentional mooting of claims by prison officials. Field worker inmates who objected to the conditions would simply file claims to get removed from field work. *Id.* at 871, fn. 6.

In a case with facts very similar to Mr. Olson's, the Eighth Circuit dismissed as moot the asserted class claims of two inmates challenging the conditions of confinement of sentenced offenders and pretrial detainees at a Nebraska County jail. *Inmates of Lincoln Intake and Detention Center v. Boosalis*, 705 F.2d 1021 (8th Cir. 1983). The named plaintiffs lost their respective personal stakes at various points prior to the district court's denial of class certification. Specifically, both were incarcerated at the county jail when the claim was filed. The convicted inmate was released prior to moving for class certification. The pretrial detainee was transferred out of the jail after moving for class certification but before the district court's ruling. *Id.* at 1023. The Eighth Circuit determined that the claim had become moot and did not qualify for an exception to application of the mootness doctrine, reasoning that *Gerstein* did not apply because, whereas *Gerstein* involved only pretrial detainees, the Lincoln Inmates case involved both convicted inmates and

pretrial detainees and the inmates had made no showing that, absent relation back of class certification, the claims would evade review. *Id.* at 1023-24, fn 2. The uncertainties faced by inmates at that county jail did not persuade the Eighth Circuit that the "inherently transitory" mootness exception applied.

In another case similar to the one at hand, the Ninth Circuit staked out something of a middle ground, holding that it was up to the district court, not the circuit court, to determine whether a claim was "inherently transitory" within the meaning of *Gerstein*. *Kirkland v. Wade*, 118 F.3d 667, 670 (9th Cir. 1997). *Kirkland* involved a proposed class action challenging the "chain gang" labor conditions at a county jail housing pretrial detainees and misdemeanants. The plaintiff filed a motion for class certification along with the complaint. However, the district court postponed ruling on class certification to consider the defendants' motion to dismiss. Shortly after postponing the ruling, the district court was informed that the plaintiff had been transferred out of the county jail. The Ninth Circuit held that the district court erred by postponing a class certification determination. On remand, the Ninth Circuit instructed the district court to consider whether Wade's claim was "inherently transitory." *Id.* "We note only that the claims have the potential for being 'inherently transitory'; whether the class claims are in fact 'inherently transitory' is ultimately a decision for the district court, and we do not in any way suggest what result that court should reach." *Id.* The average length of detention at the county jail was noted as an important detail for this analysis. In Mr. Olson's case, by contrast, the district court reviewed the average length of detention and concluded that the class claims Mr. Olson was attempting to bring were not

so transitory as to evade review. *Also see*, *Oregon Advocacy Center v. Mink*, 322 F.3d 1101, 1116-1118 (9th Cir. 2003) (Analyzing *Gerstein* and *Geraghty* in the context of a non-class claim and finding significance in a brevity of detention such that "any individual detainee's claim would probably become moot before trial.")

Finally, without a great deal of discussion, the Fourth Circuit dismissed as moot the injunctive class claims of an inmate at the Halifax County Jail for a proposed class of county jail inmates incarcerated at the county jail for more than thirty days. *Clay v. Miller*, 626 F.2d 345 (4th Cir. 1980). Clay sought to represent a class of county inmates and challenge conditions at the jail related to exercise opportunities for inmates. He was released from jail in August of 1979. The district court entered summary judgment in favor of the Sheriff and denied Clay's motion for class certification in November of 1979. The Fourth Circuit relied on *Sosna v. Iowa* in dismissing the claims for injunctive relief because Clay had been released from the county jail and was, therefore, not a member of the class he sought to represent at the time district court denying his motion for class certification. *Id.* at 346-347.

Ultimately, Article III, §2 of the United States Constitution is the foundation of federal judicial authority. Exceptions to limitations on that authority should not be made lightly. This Court has set forth the conditions under which a litigant who no longer has a personal stake may, nevertheless, maintain a class action for injunctive relief. Those conditions require that the nature of the claim itself be so transitory as to create uncertainty as to whether such a claim could ever endure long enough for a district court to

rule on class certification. The Circuit Courts are fractured in how they have implemented the decisions of this Court concerning "inherently transitory" claims. The Seventh Circuit has gone beyond what this Court has permitted. With relatively uncomplicated facts and straight forward procedural setting, the present case is a good vehicle for clarifying the contours of the "inherently transitory" exception to mootness in class action cases and for resolving the conflict among the circuits as to the proper application of that exception.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

Douglas J. Masson
Counsel of Record
HOFFMAN, LUHMAN & MASSON, PC
P.O. Box 99
Lafayette, Indiana 47902
Telephone: (765) 423-5404
Facsimile: (765) 742-6448
E-mail: djm@hlblaw.com

In the United States Court of Appeals
For the Seventh Circuit

No. 09-2728

JEFFERY MARK OLSON, on behalf of himself and a class of those similarly situated,
Plaintiff-Appellant,

v.

TRACY BROWN, in his official capacity as Sheriff of Tippecanoe County,
Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Indiana, South Bend Division.
No. 4:09-CV-00006—**Allen Sharp,** *Judge.*

ARGUED NOVEMBER 10, 2009
DECIDED FEBRUARY 4, 2010

Before POSNER and FLAUM, *Circuit Judges,* and DERYEGHIAYAN, *District Judge.*[*]

---

[*] Hon. Samuel Der-Yeghiayan, District Judge for the Northern District of Illinois, is sitting by designation.

FLAUM, Circuit Judge.

A putative class of plaintiffs, represented by Mark Olson, filed a complaint against the Sheriff of Tippecanoe County, Tracy Brown, alleging several First Amendment violations and violations of Indiana law in the Tippecanoe County Jail. Olson filed for class certification at the same time he filed the complaint. Shortly after Olson filed the complaint and motion for class certification, the Indiana Department of Correction transferred him out of Tippecanoe County Jail. Because the transfer took place before class certification, the district court dismissed the suit as moot. Olson appeals the dismissal on the ground that this case is inherently transitory for any possible named plaintiff and therefore falls within the exception to the mootness doctrine announced in *Gerstein v. Pugh*, 420 U.S. 103, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975). We find that this case fits within the exception to the mootness doctrine carved out for inherently transitory cases and therefore we reverse the district court's dismissal.

I. Background

Tippecanoe County Jail ("TCJ") is a temporary detention center that houses inmates awaiting trial, release on bail, or transfer to the Indiana Department of Correction, or serving sentences of less that one year. The parties stipulate that the following statistics regarding the inmate population as of February 20, 2009 represent a typical portrait of the inmate population at any given time: TCJ housed 529 inmates; 128 inmates had been incarcerated for less than 30 days; 119 inmates had been incarcerated

between 30 and 90 days; 130 inmates had been incarcerated between 90 and 180 days; 121 inmates had been incarcerated between 180 and 365 days; 41 inmates had been incarcerated for more than 365 days; and the average length of stay for the 529 inmates was 139 days. Coincidentally, Olson was incarcerated at TCJ for exactly 139 days-from August 29, 2008 through January 15, 2009.

TCJ employs a grievance policy to address inmate concerns. Once an inmate files a grievance, the jail is responsible for responding to the grievance within seven days. If the inmate does not agree with the decision, he or she may appeal. The jail then has fifteen days to respond to the appeal. While incarcerated at TCJ, Olson filed twenty-one grievances and twenty-one grievance appeals. The jail never responded to any of them. Olson maintained a journal recounting the precise language of each grievance and each grievance appeal. Olson's grievances included two grievances regarding jail staff opening his legal mail outside of his presence, one regarding a denial of access to the law library, and one regarding the jail's failure to respond to grievances.

On January 2, 2009, while incarcerated at TCJ, Olson filed this complaint and a motion for class certification. Olson's complaint set forth claims for injunctive relief against the Sheriff of Tippecanoe County with respect to four basic conditions of his confinement: (1) an inadequate grievance procedure, in violation of Indiana law; (2) inadequate access to the law library, in violation of Indiana law; (3) inspection of mail from the courts outside of his presence, in violation of the First and Fourteenth Amendments of the United States Constitution and Indiana

law; and (4) inspection of mail from attorneys outside his presence, in violation of the First and Fourteenth Amendments of the United States Constitution and Indiana law. With the motion for class certification, Olson included affidavits of fifty-three inmates detailing their experiences with jail staff opening their legal mail outside of their presence, denying them access to the law library, and failing to respond to their grievances. Thirteen days after Olson filed this complaint and his motion for class certification, the Indiana Department of Correction transferred Olson to a new facility.

Brown removed this cause of action to federal court on January 20, 2009. On February 2, 2009, Brown filed his answer to the complaint. On March 13, 2009, Brown filed his Motion for Judgment on the Pleadings pursuant to Rule 12(c) of the Federal Rules of Civil Procedure. The district court heard oral argument on Olson's Motion for Class Certification on March 18, 2009, but reserved its ruling on the class certification issue pending a ruling on Brown's Motion for Judgment on the Pleadings. On June 23, 2009, 171 days after the initial filing of this cause of action, the district court granted Brown's motion for Judgment on the Pleadings holding that Olson's transfer away from TCJ rendered this cause of action moot.

This appeal follows.

II. Discussion

Whether a case is moot is a question of law which we review de novo. *Franzoni v. Hartmarx Corp.*, 300 F.3d 767, 771 (7th Cir.2002). A case is moot when "the issues

presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *United States Parole Commission v. Geraghty*, 445 U.S. 388, 396, 100 S.Ct. 1202, 63 L.Ed.2d 479 (1980).

It is without question that this case would be moot if Olson had brought his claims individually. Olson only sought injunctive relief and is no longer subject to the conditions that formed the basis of his complaint. Therefore, the controversy is resolved in relation to Olson. However, Olson filed for class certification while he was a party to a live controversy. This fact would generally not save a cause of action from becoming moot upon the termination of the named plaintiff's claims prior to the certification of the class. However, timely filing for class certification can save a cause of action if it falls within the exception to the mootness doctrine announced in *Gerstein v. Pugh*, 420 U.S. 103, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975). The issue before this court is whether Olson's claim is so "inherently transitory" that it is uncertain that any member of the class would maintain a live controversy long enough for a judge to certify a class. If so, then this case is not moot for the purpose of class certification.

In *Gerstein*, the Court addressed the issue of class certification for Florida prisoners seeking a declaratory judgment that they had a constitutional right to a probable cause hearing for pretrial detention. Before reaching the substantive issues, the Court addressed whether it had jurisdiction to hear the claim. Faced with a situation where it was likely that none of the named plaintiffs had a live claim at the time of the class certification decision, the *Gerstein* Court specifically addressed the problem of mootness for

class claims brought by pre-trial detainees. The Court found that the case was not moot, reasoning:

> At the time the complaint was filed, the named respondents were members of a class of persons detained without a judicial probable cause determination, but the record does not indicate whether any of them were still in custody awaiting trial when the District Court certified the class. Such a showing ordinarily would be required to avoid mootness under *Sosna*. But this case is a suitable exception to that requirement. The length of pretrial custody cannot be ascertained at the outset, and it may be ended at any time by release on recognizance, dismissal of the charges, or a guilty plea, as well as by acquittal or conviction after trial. It is by no means certain that any given individual, named as plaintiff, would be in pretrial custody long enough for a district judge to certify the class. Moreover, in this case the constant existence of a class of persons suffering the deprivation is certain. The attorney representing the named respondents is a public defender, and we can safely assume that he has other clients with a continuing live interest in this case.

420 U.S. at 111, n. 11, 95 S.Ct. 854 (internal citations omitted). A number of subsequent Supreme Court cases have reiterated and clarified the exception to the mootness doctrine announced in Gerstein. See, e.g., *Swisher v. Brady*,

438 U.S. 204, 98 S.Ct. 2699, 57 L.Ed.2d 705 (1978); *County of Riverside v. McLaughlin*, 500 U.S. 44, 51-52, 111 S.Ct. 1661, 114 L.Ed.2d 49 (1991). In *Swisher*, the Court affirmed a district court's decision to certify a class of juveniles involved in the juvenile court system despite the fact that the named plaintiffs claims were moot at the time of the decision. The Court in *Swisher* relied on *Gerstein's* predecessor, *Sosna v. Iowa*, 419 U.S. 393, 95 S.Ct. 553, 42 L.Ed.2d 532 (1975), to find:

> There may be cases in which the controversy involving the named plaintiff is such that it becomes moot as to them before the district court can reasonably be expected to rule on a certification motion. In such instances, whether certification can be said to "relate back" to the filing of the complaint may depend on upon the circumstances of the particular case and especially the reality of the claim that otherwise the issue would evade review.

Swisher, 438 U.S. at 213, n. 11, 98 S.Ct. 2699. In *McLaughlin*, the Court relied on the "inherently transitory" exception to find, "that the class was not certified until after the named plaintiffs' claims had become moot does not deprive [the Court] of jurisdiction," in a case challenging the denial of a prompt probable cause hearing for inmates in the county jail. 500 U.S. at 52, 111 S.Ct. 1661.

Although we have yet to apply the *Gerstein* line of cases to a case involving jail inmates in this circuit, the Second Circuit directly addressed this issue in *Zurak v.*

Regan, 550 F.2d 86 (2d Cir.1977). In *Zurak*, a class of inmates at Rikers Island filed suit against the New York State Board of Parole alleging a violation of their due process rights regarding their conditional release. 550 F.2d at 90. All of the class members were serving a sentence of ninety-days or more. *Id.* At the time the district court certified the class, all of the named plaintiffs had already been released from Rikers Island. *Id.* The defendants appealed the district court's ultimate decision on the merits by arguing that the case was moot at the time of class certification and therefore the district court acted without proper jurisdiction. *Id.* However, the Second Circuit found that this case was not moot at the time of class certification because it fit squarely within the exception carved out by Gerstein. *Id.* The court reasoned that the exception for inherently transitory claims applied in this situation because, "the relatively short periods of incarceration involved and the possibility of conditional release [created] a significant possibility that any single named plaintiff would be released prior to certification, although this possibility was less substantial than it was in *Gerstein*. As in *Gerstein*, however, the constant existence of a class of persons suffering the alleged deprivation is certain and the court may safely assume that counsel has other clients with a continuing live interest in the issues." *Id.* at 91-92 (citing *Gerstein v. Pugh*, 420 U.S. 103, 110 n. 11, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975)).

We agree with the Second Circuit's determination that the Gerstein line of cases require a claim to meet two main elements for the "inherently transitory" exception to apply: (1) it is uncertain that a claim will remain live for any individual who could be named as a plaintiff long enough for a court to certify the class; and (2) there will be a constant

class of persons suffering the deprivation complained of in the complaint. *Gerstein*, 420 U.S. at 110 n. 11, 95 S.Ct. 854; *Zurak*, 550 F.2d at 91-92. Olson's claim meets both requirements.

First, based on the stipulated facts, it is uncertain that any potential named plaintiff in the class of inmates would have a live claim long enough for a district court to certify a class. As *Gerstein* and *Zurak* both explicitly point out, the length of incarceration in a county jail generally cannot be determined at the outset and is subject to a number of unpredictable factors, thereby making it inherently transitory. While the ultimate length of confinement does affect the applicability of the "inherently transitory" exception, the essence of the exception is uncertainty about whether a claim will remain alive for any given plaintiff long enough for a district court to certify the class. In *Banks v. NCAA*, 977 F.2d 1081, 1086 (7th Cir.1992) and *Trotter v. Klincar*, 748 F.2d 1177 (7th Cir.1984), we specifically addressed the fact that the crux of the "inherently transitory" exception is the uncertainty about the length of time a claim will remain alive. In both cases we found that the "inherently transitory" exception did not apply because in both cases the named plaintiffs knew, from the outset, exactly how long their claims would remain alive but chose to wait to file for class certification until the claim was nearly moot or already moot. In Banks, the plaintiff knew from the outset that his claim would become moot 120 days from the onset of the controversy, but he purposefully chose to wait 112 days before filing his complaint. 977 F.2d at 1086. We relied on this intentional delay in filing to find that the plaintiff was precluded from benefitting from the "inherently transitory" exception to the mootness doctrine. *Id.* ("Had Banks been

diligent in filing his claim shortly after discovering that he had failed to be selected for the draft or as a free agent, and still been unable to obtain class certification, he might have been able to make an argument for the class that he had standing for the purpose of pursing a ruling on class certification even though his own individual claim had become moot."). In *Trotter*, the named plaintiff had a live claim for seventy days but never filed for class certification. The plaintiff still attempted to rely on the "inherently transitory" exception for class actions when the court ruled that his case was moot. 748 F.2d at 1184-85. Similar to our reasoning in Banks, we found that the "inherently transitory" exception was inapplicable in *Trotter* because the plaintiff knew that his cause of action would soon become moot but chose not to file for class certification.

Brown attempts to read *Banks* and *Trotter* to create a bright-line rule that we cannot apply the "inherently transitory" exception to a claim that has been alive beyond a given number of days. Brown argues that the "inherently transitory" exception should not apply here because Olson's delay in filing this suit is the same as the one hundred and twenty day delay in Banks and the seventy-day delay in *Trotter*. This analogy is misguided in two respects. First, no such bright-line rule exists. Unlike the plaintiffs in *Banks* and *Trotter*, Olson did not know when his claim would become moot. The duration of his claim was at the discretion of the Indiana Department of Correction. An individual incarcerated in a county jail may be released for a number of reasons that he cannot anticipate. Olson's transfer by the Indiana Department of Correction just thirteen days after he filed for class certification in this suit illustrates one such unpredictable occurrence that could unexpectedly moot a

claim for a county jail inmate. This uncertainty is precisely what makes the "inherently transitory" exception applicable in this case. Second, because Olson was required to exhaust his administrative remedies before filing this suit, the period of time between the first possible day he could file and the day he actually filed was only fifty-two days-a significantly shorter period of time than was at issue in *Banks* or *Trotter*.

The case at bar also meets the second requirement for the inherently transitory exception-there will be a constant class of persons suffering the deprivation. Contrary to Brown's argument, the "inherently transitory" exception to the mootness doctrine is distinct from the "capable of repetition yet evading review" exception. When the claim is inherently transitory, as it was in *Gerstein* and as it is in this case, the plaintiff must show that there will likely be a constant class of persons suffering the deprivation complained of in the complaint. This is different from when a plaintiff invokes the "capable of repetition yet evading review" exception, where the plaintiff must show that the claim is capable of repetition as to the named plaintiff. A close reading of *United States Parole Commission v. Geraghty*, 445 U.S. 388, 398-99, 100 S.Ct. 1202, 63 L.Ed.2d 479 (1980), makes this distinction clear. In *Geraghty*, the Court first acknowledged that a plaintiff must have a reasonable expectation of being subjected to the offending behavior in the future to avail himself of the "capable of repetition yet evading review" exception to the mootness doctrine. However, the Court then turned to *Gerstein* and found that the "inherently transitory" exception does not require any indication that the named plaintiff would be subject to the complained-of situation in the future but just that the claim is capable of repetition. *Geraghty*, 445 U.S. at 398-99, 100

S.Ct. 1202. Our own precedent also supports this distinction. In *Banks*, we treated "inherently transitory" and "capable of repetition yet evading review" as two separate lines of argument by the plaintiff for why the case was not moot. 977 F.2d at 1085-86.

Because Olson asks this court to apply the "inherently transitory" exception, not the "capable of repetition yet evading review" exception, the Supreme Court's recent holding in *Alvarez v. Smith*, 588 U.S. ----, 130 S.Ct. 576, --- L.Ed.2d ---- (2009), is not applicable to this case. In *Alvarez*, the Court held that the plaintiffs could not rely on the "capable of repetition yet evading review" principle to avoid mootness because they could not show that they were likely to be subjected to the complained-of state procedures again. *Alvarez*, at 581-83. As discussed above, the "inherently transitory" exception does not require such a showing. Additionally, the district court in Alvarez denied the plaintiffs' motion for class certification. The plaintiffs never appealed that decision. Significantly, this case is in a different procedural posture. Here, Olson seeks to keep the claim alive beyond his individual claim to certify the class. If the district court certifies the class, the case can proceed to the merits for the certified class of plaintiffs. The *Alvarez* plaintiffs, through their inaction in response to the denial of class certification, conceded that their claims should not extend beyond the life of their individual claims. The difference in procedural postures of the two cases makes *Alvarez* inapplicable to the case at hand.

Since we find that the claim "is of the kind that is unlikely to be able to certified before it becomes moot," and thereby meets the first requirement of *Gerstein*, all Olson

must show is that the claim is likely to recur with regard to the class, not that the claim is likely to recur with regard to him. The pervasive nature of these claims, as evidenced by the fifty-three affidavits outlining problems similar to those complained of by Olsen, makes it likely that TCJ's alleged practices of opening inmates' legal mail, denying inmates access to the law library, and failing to respond to inmates' grievances will continue. Therefore, this case meets the second requirement of the inherently transitory exception.

As a final argument, Brown urges us to affirm the dismissal of the suit on the ground that it fails to state a claim for which relief may be sought. However, the district court did not reach this issue before dismissing the case for lack of jurisdiction. Therefore, we do not reach the issue of whether the pleadings state a claim for which relief may be sought.

Additionally, Olson asks that we address the issue of class certification. We decline this invitation. A district court has broad discretion to determine whether certification of a class action lawsuit is appropriate. *Mira v. Nuclear Measurements Corp.*, 107 F.3d 466, 474 (7th Cir.1997). Therefore, we remand to the district court to determine whether class certification is appropriate in this case.

III. Conclusion

For the above stated reasons, we REVERSE the district court's dismissal of the complaint as moot. We REMAND for consideration of the plaintiff's motion for class certification and defendant's motion for dismissal for failure to state a claim.

NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION AT LAFAYETTE

JEFFREY MARK OLSON, on his own behalf and on of a class of those similarly situated, Plaintiffs,	)	
v.	)	No. 4:09-cv-00006
TRACY BROWN, in his official capacity as Sheriff of Tippecanoe County, Defendant,	)	

MEMORANDUM OPINION AND ORDER

This matter is before the Court on the Motion for Judgment on the Pleadings (Doc. No. 19) filed by Defendant Tracy Brown ("Sheriff Brown") on March 13, 2009, pursuant to the Federal Rules of Civil Procedure, Rule 12(c), against Plaintiff Jeffrey Mark Olson ("Mr. Olson" or "Plaintiff") who is suing on his own behalf and on behalf of a class of those similarly situated.

On March 18, 2009, the Court heard oral argument in South Bend on the pending Motion for Class Certification under Fed. R. Civ. Pro. 23(a) and (b)(2) (Doc. No. 2). At the time of the hearing, the Motion for Judgment on the Pleadings filed on March 13, 2009 (Doc. No. 19) was not yet ripe. The parties were informed that a ruling on the latter motion (once ripe) would precede consideration of the class certification, and no objection was made. Because the issues raised in both motions overlap, the Court considers the arguments made in the briefs for both motions, and the

arguments made during the March 18 hearing, to the extent that they are relevant here. For the reasons that follow, Sheriff Brown's Motion for Judgment on the Pleadings is GRANTED.

I. Procedural and Factual Background

On January 2, 2009, Mr. Olson filed a "class action complaint for declaratory and injunctive relief" to enjoin the practices of the Tippecanoe County Jail. Mr. Olson sues on his behalf and on the behalf of "any and all persons currently confined, or who will in the future be confined, in the Tippecanoe County Jail." Class Action Complaint, ¶ 6. On January 20, 2009, Sheriff Brown removed the case from Tippecanoe County State Court to this Court based upon federal question jurisdiction.

By way of background, Mr. Olson was sentenced on or about November 1, 2003, to ten years in the Indiana Department of Corrections. While pending transfer to a different facility, he was held at the Tippecanoe County Jail ("the Jail") beginning on August 29, 2008. While at the Jail, numerous violations of law against him allegedly occurred primarily in September and October 2008, including the following claims:

> (1) improper handling of legal mail, which was opened outside the presence of the addressee/inmate;
> (2) providing unreasonable access to the law library;
> (3) improper handling/delayed response (or no response) to inmate grievances;

> (4) providing incorrect prescription medications to inmates;
> (5) providing dirty eating utensils and cups to inmates who are without a means to sanitize their own utensils;
> (6) providing a law library that is out-of-date;
> (7) charging excessive charges for medical visits and medications; and,
> (8) charging excessive commissary prices, including excessive prices for pre-paid phone cards.

See Class Action Complaint, pp. 3-11. On November 7, 2008, Mr. Olson filed a final grievance with the Jail stating:

> On October 25, 2008, I submitted a grievance due to jail personnel not responding to any prior grievance. Again, personnel have ignored my grievance and failed to reply. Please reply to my 10-25-08 grievance. If you fail, I will not file any more grievances, I will proceed to the United States District Court. Please accept this as my appeal of my October 25, 2008, grievance.

See Doc. No. 1-2, Class Action Complaint, p. 8. Almost 2 months later, on January 2, 2009, Plaintiff filed his Class Action Complaint and a Motion for Class Certification while he was incarcerated in the Jail. On January 15, 2009, after being incarcerated at the Jail for over 4 months (approximately 139 days), yet only 2 weeks after filing the Class Action Complaint, Mr. Olson was transferred from the Jail directly to the Indiana Department of Correction. *See*

Doc. No. 16-2, Olson Affidavit, ¶ 1.

The average length of stay of inmates in the Jail during the relevant time frame is 139 days. Of those inmates incarcerated in the Jail on February 20, 2009, 128 inmates were incarcerated in the Jail for less than 30 days; 119 were incarcerated in the Jail for between 30 and 90 days; 130 were incarcerated in the Jail for between 90 and 180 days; 121 were incarcerated in the Jail for between 180 and 365 days; and 41 were incarcerated in the Jail for more than 365 days.

Defendant Sheriff Brown argues that judgment under Rule 12(c) is proper because:

(1) the Plaintiff has no private right of action to enforce jail standards set forth in 210 Ind. Admin. Code 3-1-15 (concerning jail law libraries and grievance procedures) and set forth in 210 Ind. Admin. Code 3-1-16 (concerning handling of inmate mail from attorneys and the courts) because these standards are enforced by the Indiana Department of Corrections;

(2) there is no constitutional privilege with respect to mail coming from the courts since they are public documents and implicate no privacy right; and, mail from attorneys where no attorney-client privilege has been claimed is not constitutionally protected; and/or

(3) Mr. Olson's claims for injunctive relief are moot because he is no longer incarcerated at the Tippecanoe County Jail, and was transferred to the Indiana Department of Corrections on January 15, 2009.

II. Standard of Review

Under Federal Rule of Civil Procedure 12(c), a party may move for judgment on the pleadings "[a]fter the pleadings are closed but within such time as not to delay the trial." A Rule 12(c) motion for judgment on the pleadings is reviewed "under the same standards as a motion to dismiss under 12(b). *Flenner v. Sheahan*, 107 F.3d 459, 461 (7th Cir.1997); *see also Ashcroft v. Iqbal*, --- U.S. ----, ----, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868, ---- (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556-70, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007) (to survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face.")); *Limestone Development Corp. v. Village of Lemont, Ill.*, 520 F.3d 797, 803 (7th Cir.2008) (reasoning that a complaint must allege facts to state a claim to relief that is plausible on its face) (citing *Bell Atl. Corp.*, 550 U.S. at 544). A motion for judgment on the pleadings is properly granted where, accepting all "well-pleaded allegations in the complaint as true" and drawing all "reasonable inferences in favor of the plaintiff," the moving party is entitled to judgment as a matter of law. *Forseth v. Vill. of Sussex*, 199 F.3d 363, 368 (7th Cir.2000).

For purposes of Rule 12(c), pleadings include the complaint, the answer, and any written instruments attached as exhibits. See Fed.R.Civ.P. 10(c); *Northern Indiana Gun & Outdoor Shows, Inc. v. City of South Bend*, 163 F.3d 449, 452-53 (7th Cir.1998) (concluding that the broader interpretation of "written instrument" comports with the generous nature in which we view pleadings, and therefore "written instrument," as used in Rule 10(c), includes

documents such as affidavits) (citing *Schnell v. City of Chicago*, 407 F.2d 1084, 1085 (7th Cir.1969), overruled on other grounds by *City of Kenosha v. Bruno*, 412 U.S. 507, 93 S.Ct. 2222, 37 L.Ed.2d 109 (1973)). *But see Rose v. Bartle*, 871 F.2d 331, 339-40 n. 3 (3d Cir.1989) (concluding that affidavits are not written instruments). Rule 10(c) provides that "[a] copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes." *McCready v. eBay, Inc.*, 453 F.3d 882, 891 (7th Cir.2006). From this rule, the Seventh Circuit has concluded "documents attached to a motion to dismiss are considered part of the pleadings if they are referred to in the plaintiff's complaint and are central to his claim." Id. (citations omitted). Based on the generous nature in which pleadings are viewed, the Court considers for purposes of this ruling, the stipulation (Doc. No. 18) and affidavits submitted by Plaintiff and similarly situated inmates attesting to the alleged violations of their rights, because these documents are part of the pleadings where they form the basis of the Complaint and are central to the claims made therein.

III. Discussion

The Court begins its analysis where it will soon end-on the issue of whether Mr. Olson's claims are moot, and the effect thereof.[1] Mr. Olson admits that he is no longer

---

[1] Mr. Olson's standing to initially sue is uncontested. Mr. Olson satisfied each of the Article III requirements for standing to sue by alleging an actual "injury in fact" that is concrete and particularized and is fairly traceable to the challenged action of the defendant and likely to be redressed by a favorable decision. *Arreola v. Godinez*, 546 F.3d 788, 794-95 (7th Cir.2008) (stating that "it is best to confine the term

an inmate at the Tippecanoe County Jail, but relies on the relation-back doctrine discussed in *Gerstein v. Pugh*, 420 U.S. 103, 111 n. 11, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975), for his position that the class action survives and is not rendered moot, because he filed the Complaint and requested class certification prior to his transfer from the Jail. See Doc. Nos. 12, 28. While Mr. Olson is correct that inherently transitory claims may avoid dismissal as a result of mootness, *see infra*, he is incorrect in classifying his case as one that meets an exception to the mootness doctrine.

Because Mr. Olson filed his Complaint while he was in the Jail, this case is not moot on arrival. *See e.g., Holstein v. City of Chicago*, 29 F.3d 1145, 1147 (7th Cir.1994) (noting that the named plaintiff, who did not move for class certification prior to the expiration of his individual claims, "cannot avail himself of the class action exception to the mootness doctrine."); *Holmes v. Fisher*, 854 F.2d 229, 232 (7th Cir.1988) (finding that the case was "dead on arrival, moot the day the complaint was filed ... there was never a case or controversy within the meaning of Art. III of the Constitution" because the plaintiff did not file his suit until after he was arrested and after he received the hearing which he contended arrested persons were entitled). Instead, Mr. Olson's case became moot upon his transfer from the Jail on January 15, 2009- after he filed the

---

'standing' to the Article III inquiry and thus to keep it separate from the plaintiff's entitlement to relief or [the plaintiff's] ability to satisfy the Rule 23 criteria.") (citing *Payton v. County of Kane*, 308 F.3d 673, 676 (7th Cir.2002)). Mr. Olson had standing when he filed the Complaint seeking injunctive relief where he was incarcerated in the Jail experiencing the alleged unlawful actions of the defendant.

Complaint and request for certification on January 2, 2009, but before the class could be certified.

Under *Sosna v. Iowa*, 419 U.S. 393, 95 S.Ct. 553, 42 L.Ed.2d 532 (1975) and *United States Parole Commission v. Geraghty*, 445 U.S. 388, 100 S.Ct. 1202, 63 L.Ed.2d 479 (1980), the mootness of a plaintiff's personal claim did not prevent him from serving as the representative of a class. In *Sosna*, however, the class was certified before the representative's case became moot, and the Court reasoned that after certification the class itself was the plaintiff. *Geraghty*, which was specifically limited to the appeal of the denial of the class action motion, held that when the district court denies the plaintiff's motion to certify a class, and the plaintiff appeals from the denial, if his appeal is pending when his substantive claim evaporates, then the appeal is not moot. *See also Weismueller v. Kosobucki*, 513 F.3d 784, 786 (7th Cir.2008) (citing *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326, 335-37, 100 S.Ct. 1166, 63 L.Ed.2d 427 (1980); *Geraghty*, 445 U.S. at 404)). This is so "because unless and until the appellate court affirms the denial of the motion to certify a class, there may be people other than the plaintiff with a legally protected interest in the suit-namely the unnamed members of the class." *Weismueller*, 513 F.3d at 786.

While Mr. Olson did move for class certification prior to the evaporation of his personal stake, he cannot claim the benefit of this exception to the mootness doctrine because this Court did not certify the class in the short time between the filing of his Complaint and request for class certification, and his subsequent transfer from the Jail-a mere thirteen days. The requirement that Mr. Olson's case be dismissed

under these circumstances has been made clear by the Seventh Circuit Court of Appeals. *Weismueller*, 513 F.3d at 786 ("If on the other hand, the named plaintiff's claim becomes moot before the class is certified, the suit must be dismissed because no one besides the plaintiff has a legally protected interest in the litigation.") (citing *Board of School Commissioners v. Jacobs*, 420 U.S. 128, 130, 95 S.Ct. 848, 43 L.Ed.2d 74 (1975) (per curiam) (holding that "Because the class action was never properly certified nor the class properly identified by the District Court, the judgment of the Court of Appeals is vacated and the case is remanded ... to vacate [the District Court's] judgment and to dismiss the complaint"); *Bertrand ex rel. Bertrand v. Maram*, 495 F.3d 452, 456 (7th Cir.2007) (stating that "if the would-be representative's claim becomes moot before certification, then the case must be dismissed)).

However, as argued by Mr. Olson, he may avoid dismissal because of mootness, if he is able to demonstrate that his claim on the merits, while no longer live, is "capable of repetition, yet evading review." *Holstein v. City of Chicago*, 29 F.3d 1145, 1147 (7th Cir.1994). To do so, Mr. Olson must prove that:

> 1) his claim is "so inherently transitory that the trial court [did] not have enough time to rule on a motion for class certification before the proposed representative's individual interest expire[d]," *County of Riverside v. McLaughlin*, 500 U.S. 44, 52, 111 S.Ct. 1661, 114 L.Ed.2d 49 (1991) (citations omitted); and 2) he will again be subject to the alleged illegality, *City of Los Angeles v. Lyons*, 461

> U.S. 95, 110, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983). *See Robinson v. City of Chicago*, 868 F.2d 959, 967 (7th Cir.1989).

Holstein, 29 F.3d at 1147; *see also Franks v. Bowman Transportation Company*, 424 U.S. 747, 756 n. 8, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976) ("Thus, the 'capable of repetition, yet evading review' dimension of Sosna must be understood in the context of mootness as one of the policy rules often invoked by the Court 'to avoid passing prematurely on constitutional questions. Because (such) rules operate in 'cases confessedly within (the Court's) jurisdiction' ... they find their source in policy, rather than purely constitutional, considerations.") (citations omitted).

The United States Supreme Court has also held that when a class action is sought, the mooting of the plaintiff's individual claims for relief does not moot the case if, the plaintiff's individual claims are inherently transitory. In *Gerstein*, 420 U.S. at 103, the named plaintiffs filed a class action challenging pretrial detention conditions. The Court assumed that the named plaintiffs were no longer awaiting trial at the time the trial court certified the class of pretrial detainees. *Id.* at 111 n. 11. In addition, there was no indication that the named plaintiffs might again be subject to pretrial detention. *Id.* Nevertheless, the Court held that the case was not moot:

> This case belongs, however, to that narrow class of cases in which the termination of a class representative's claim does not moot the claims of the unnamed members of the class. *See Sosna v. Iowa*, 419 U.S. 393, 95 S.Ct. 553,

> 42 L.Ed.2d 532 (1975). Pretrial detention is by nature temporary, and it is most unlikely that any given individual could have his constitutional claim decided on appeal before he is either released or convicted ... This claim, in short, is one that is distinctly 'capable of repetition, yet evading review'... It is by no means certain that any given individual, named as plaintiff, would be in pretrial custody long enough for a district judge to certify the class ...

Gerstein, 420 U.S. at 111, n. 11.

Similarly, in *County of Riverside v. McLaughlin*, 500 U.S. 44, 111 S.Ct. 1661, 114 L.Ed.2d 49 (1991), a class action was brought by arrestees challenging the manner in which the defendant county provided probable cause determinations to persons who had been arrested without a warrant. *Id.* at 47. At the time the suit was filed, the named plaintiffs were incarcerated. *Id.* at 51. However, by the time the class was certified, their individual claims were moot. *Id.* at 51-52. The Court found that the case itself was not moot and that the class was properly certified:

> That the case was not certified until after the named plaintiffs' claims had become moot does not deprive us of jurisdiction. We recognized in *Gerstein* that "[s]ome claims are so inherently transitory that the trial court will not have even enough time to rule on a motion for class certification before the proposed representative's individual interest

> expires."... In such cases, the "relation back" doctrine is properly invoked to preserve the merits of the case for judicial resolution.

McLaughlin, 500 U.S. at 52.

Regarding the transitory nature of the claim, Mr. Olson was incarcerated for over four months, and filed his last Jail grievance on November 7 requesting a response to his October 25 grievance. Thereafter, Mr. Olson waited nearly 2 months (56 days) to file his class action complaint in federal court. There is no evidence that after not receiving grievance responses, Mr. Olson was kept from accessing the Court. Moreover, based on the average length of incarceration, Mr. Olson is among the approximate 54% of the inmate population that is incarcerated more than 90 days in the Jail. In fact, approximately 30% of the inmate population is incarcerated in the Jail for more than half a year. Further, Mr. Olson's situation is one unlike those cases where a court normally will not have even enough time to rule on a motion for class certification before the proposed representative's individual interest expires, such as a challenge presented to pretrial detention, *see Gerstein*, 420 U.S. 103, 95 S.Ct. 854, 43 L.Ed.2d 54, or probable cause determinations for those recently arrested, *see McLaughlin*, 500 U.S. 44, 111 S.Ct. 1661, 114 L.Ed.2d 49, or intake strip searches after arrests, *see May v. Frisbie*, 2009 WL 1148223 (S.D.Ind. Apr.28, 2009). Here, Mr. Olson, like over half the inmates in the Jail, was incarcerated for over 3 months. Based on these facts, this Court cannot say that Mr. Olson's claims are so inherently transitory that he can evade the mootness doctrine. *See Banks v. NCAA*, 977 F.2d 1081, 1086 (7th Cir.1992) (reasoning that had plaintiff filed his complaint

shortly after discovering the alleged conduct, and still been unable to obtain class certification, he might have been able to make an argument that the claim was transitory); *Trotter v. Lincar*, 748 F.2d 1177, 1184-85 (7th Cir.1984) (rejecting a claim that 70 days provided insufficient time to obtain a ruling on a motion for class certification).

Although this is enough to dismiss Mr. Olson's complaint, the Court also finds that it is not likely that Mr. Olson will be subject to the Jail's procedures in the future. *See Holmes v. Fisher*, 854 F.2d 229, 232 (7th Cir.1988) (finding that the "capable of repetition but evading review" doctrine applies only when repetition is likely to embroil the same parties to the dispute) (citations omitted). The mere physical or theoretical possibility of Mr. Olson being incarcerated at the Jail and suffering the alleged wrongful acts of the defendants is insufficient to satisfy this prong. *Holstein*, 29 F.3d at 1148 (citing *Jones v. Sullivan*, 938 F.2d 801, 806 (7th Cir.1991)). Instead, there must be a "reasonable expectation" or a "demonstrable probability" that the same controversy will recur involving the same parties. *Id.* (citing *Jones*, 938 F.2d at 807) (quoting *Murphy v. Hunt*, 455 U.S. 478, 482, 102 S.Ct. 1181, 71 L.Ed.2d 353 (1982)). Mr. Olson cannot make such a showing.

Mr. Olson's case cannot be classified as transitory or capable of repetition but evading review-certainly a given inmate at the Jail, named as plaintiff, could be, and in fact has been most recently, incarcerated long enough for a district judge to certify a class. *See Arreola v. Godinez*, 546 F.3d 788, 799 (7th Cir.2008) ("[W]e cannot conclude that it would be impossible for a more suitable representative of a Rule 23(b)(2) class to emerge. This also means that, contrary to

[the plaintiff's] arguments, this case is not a good candidate for application of the 'capable of repetition, yet evading review' concept.") (citation omitted). As a result, Mr. Olson's claim is moot.

IV. Conclusion

For the reasons stated herein, the Court GRANTS Defendant Sheriff Brown's Motion For Judgment on the Pleadings (Docket No. 19), as this case is deemed moot and is dismissed without prejudice. Each party to bear its own costs.

SO ORDERED.

DATED: June 22, 2009

/s/Allen Sharp
ALLEN SHARP, JUDGE
UNITED STATES DISTRICT COURT

Supreme Court, U.S.
FILED
MAY 18 2010
OFFICE OF THE CLERK

No. 09-1316

In The

Supreme Court of the United States

TRACY BROWN,

Petitioner,

v.

JEFFREY MARK OLSON,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION

GAVIN M. ROSE
Counsel of Record
KENNETH J. FALK
ACLU OF INDIANA
1031 E. Washington St.
Indianapolis, IN 46202
Ph: 317/635.4059, x106
Fax: 317/635.4105
grose@aclu-in.org

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

In *Gerstein v. Pugh*, 420 U.S. 103 (1975), this Court established a limited exception to the mootness doctrine for claims brought on behalf of a putative class of similarly situated individuals whereby the case is deemed justiciable notwithstanding the mooting of the named plaintiff's individual claims when (a) "it is by no means certain that any given individual, named as plaintiff, would be in pretrial custody long enough for the district court to certify the class," and (b) "the constant existence of a class of persons suffering the [alleged] deprivation is certain." *Id.* at 111 n.11. This "inherently transitory" exception to traditional Article III standing, which requires a fact-based and case-specific analysis, has been repeatedly reaffirmed by this Court and faithfully applied by the lower courts. The question presented is:

Whether the Seventh Circuit properly applied the "inherently transitory" exception to the mootness doctrine to a putative class action brought on behalf of a named plaintiff seeking declaratory and injunctive relief who was unexpectedly transferred away from Tippecanoe County Jail – and whose individual claims were thereby rendered moot – when (a) the district court held the plaintiff's class motion under advisement for a lengthier period of time than the plaintiff's entire stay in the jail, (b) the period of time that the claims of any individual named as

QUESTION PRESENTED – Continued

plaintiff would remain extant cannot be known at the outset of litigation, (c) nearly fifty percent (50%) of all inmates are incarcerated at the jail for less than three (3) months, (d) each member of the putative class is subject to release at a moment's notice, and (e) it is undisputed that a constant class of persons suffering the alleged deprivations at issue in this case remains in existence.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
INTRODUCTION	1
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE PETITION	3
I. The Seventh Circuit faithfully applied this Court's precedents in rendering the fact-specific determination that this case meets the "inherently transitory" exception to the mootness doctrine	4
II. There is no conflict amongst the circuits regarding the application of the "inherently transitory" exception, and the Sheriff's attempt to create one reveals only the common-sense conclusion that the application of this Court's clear and unequivocal test will result in different outcomes when invoked in different factual settings	11
CONCLUSION	17

TABLE OF AUTHORITIES

Page

CASES

Arrango v. Ward, 103 F.R.D. 638 (S.D.N.Y. 1984) 5

Bell v. Wolfish, 441 U.S. 520 (1979) 16

Board of Sch. Comm'rs of City of Indianapolis v. Jacobs, 420 U.S. 128 (1975) (*per curiam*) 10

Clay v. Miller, 626 F.2d 345 (4th Cir. 1980) 16

Coleman v. Stanziani, 570 F.Supp. 679 (E.D. Pa. 1983) 5

County of Riverside v. McLaughlin, 500 U.S. 44 (1991) 4

Cruz v. Farquharson, 252 F.3d 530 (1st Cir. 2001) 12, 13

Cruz v. Hauck, 627 F.2d 710 (5th Cir. 1980) 15, 16

Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326 (1980) 10, 11

Dillard v. Pitchess, 399 F.Supp. 1225 (C.D. Cal. 1975) 5

Faheem-El v. Klincar, 600 F.Supp. 1029 (N.D. Ill. 1985) 5

Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147 (1982) 9

Gerstein v. Pugh, 420 U.S. 103 (1975) ..... *passim*

Green v. Johnson, 513 F.Supp. 965 (D. Mass. 1981) 5

TABLE OF AUTHORITIES – Continued

Page

Holmes v. Fisher, 854 F.2d 229 (7th Cir. 1988).....13

Inmates of Lincoln Intake & Detention Ctr. v. Boosalis, 705 F.2d 1021 (8th Cir. 1983).....14

Jane B. v. New York City Dep't of Soc. Servs., 117 F.R.D. 64 (S.D.N.Y. 1987).....5

Jones v. Diamond, 519 F.2d 1090 (5th Cir. 1975).....4

Kazarov v. Achim, No. 02-C-5097, 2003 WL 22956006 (N.D. Ill. Dec. 12, 2003).....5

McGill v. Parsons, 532 F.2d 484 (5th Cir. 1976).....4

Marcera v. Chinlund, 565 F.2d 253 (2d Cir. 1977) (*per curiam*).....4

Mudd v. Busse, 68 F.R.D. 522 (N.D. Ind. 1975), *on reconsideration on other grounds*, 437 F.Supp. 505 (N.D. Ind. 1977), *aff'd*, 582 F.2d 1283 (7th Cir. 1978).....5

Olson v. Brown, 594 F.3d 577 (7th Cir. 2010)....*passim*

Richardson v. Monroe County Sheriff, No. 1:08-CV-0174, 2008 WL 3084766 (S.D. Ind. Aug. 4, 2008).....4

Rocky v. King, 900 F.2d 864 (5th Cir. 1990).....15

Swisher v. Brady, 438 U.S. 204 (1976).....4, 6

Tucker v. City of Montgomery Bd. of Comm'rs, 410 F.Supp. 494 (M.D. Ala. 1976).....5

U.S. Parole Comm'n v. Geraghty, 445 U.S. 388 (1980).....10, 13, 16

TABLE OF AUTHORITIES – Continued

Page

Vandehey v. Vallario, No. 06-CV-01405, 2008 WL 697428 (D. Colo. Mar. 13, 2008).....4

Wade v. Kirkland, 118 F.3d 667 (9th Cir. 1997) 13, 14

Weinstein v. Bradford, 423 U.S. 147 (1975).....10

Zurak v. Regan, 550 F.2d 86 (2d Cir. 1977) 4

STATUTES

42 U.S.C. § 1997e(a) 12

OTHER AUTHORITIES

Thomas E. Willging et al., *An Empirical Analysis of Rule 23 to Address the Rulemaking Challenges*, 71 N.Y.U. L. REV. 74 (1996) 7

INTRODUCTION

The petitioner avers repeatedly that the Seventh Circuit misapplied this Court's precedents establishing an "inherently transitory" exception to the mootness doctrine. This is not true, and the petitioner's purported circuit split reflects only the common-sense notion that differing facts viewed under the same legal test may yield different results. Plenary review by this Court is not justified, and the petition should therefore be denied.

STATEMENT OF THE CASE

On January 2, 2009, while still incarcerated in the Tippecanoe County Jail, Jeffrey Mark Olson filed his Class Action Complaint for Declaratory and Injunctive Relief, in which he challenges four (4) alleged practices or policies of the Sheriff as violative of the United States Constitution and Indiana law. The plaintiff's Motion for Class Certification was filed contemporaneously with his complaint.

Thirteen (13) days after the filing of his complaint, and while his class motion remained pending, the plaintiff was transferred away from the jail to the Indiana Department of Correction. The Sheriff thereafter sought dismissal of the plaintiff's claims, arguing that his transfer rendered the case moot. The district court agreed. While the court acknowledged that "when a class action is sought, the mooting of the plaintiff's individual claims for relief does not moot

the case if[] the plaintiff's individual claims are inherently transitory" (App. 23), it nonetheless held that two (2) facts rendered the present case ineligible for this exception: first, the plaintiff filed his last grievance appeal nearly two (2) months before seeking redress in court; and second, slightly more than half of the population of the Tippecanoe County Jail is incarcerated for more than 90 days, and approximately 30% of the inmate population is incarcerated for more than half a year (App. 25).

On appeal, the Seventh Circuit reversed. This Court's precedents, said the court,

> require a claim to meet two main elements for the "inherently transitory" exception to apply: (1) it is uncertain that a claim will remain live for any individual who would be named as plaintiff long enough for a court to certify the class; and (2) there will be a constant class of persons suffering the deprivation complained of in the complaint.

(App. 8-9). The court noted the relatively brief duration of confinement at the jail and, addressing the first element, concluded that "based on the stipulated facts, it is uncertain that any potential named plaintiff in the class of inmates would have a live claim long enough for the district court to certify the class" (App. 9). Dispensing with the notion that a bright-line rule exists whereby the "inherently transitory" nature of a claim may be gleaned from the number of days a plaintiff's claims were extant, the court drew specific attention to the fact that the duration of Mr.

Olson's claims were "at the discretion of the Indiana Department of Correction." Said the court: "An individual incarcerated in a county jail may be released for a number of reasons he cannot anticipate. . . . This uncertainty is precisely what makes the 'inherently transitory' exception applicable in this case" (App. 10-11). Addressing the second element that must be met for a plaintiff to benefit from the "inherently transitory" exception, the court noted that "[t]he pervasive nature of these claims, as evidenced by the fifty-three affidavits outlining problems similar to those complained of by Olson, make it likely that [the jail's] alleged practices . . . will continue" (App. 13).

REASONS FOR DENYING THE PETITION

The Sheriff advances two (2) primary arguments in support of his petition. First, he argues that the Seventh Circuit impermissibly expanded the "inherently transitory" exception to the mootness doctrine by applying that exception to a case in which the class's claims are only potentially transitory; and second, he insists that the circuit courts have experienced difficulty in applying the unequivocal commands of *Gerstein v. Pugh*, 420 U.S. 103 (1975), and its progeny. However, the former argument is betrayed by the plain language of *Gerstein*, and the latter is erroneous as a factual matter. Nothing in this case warrants this Court's review, and the petition should therefore be denied.

I. The Seventh Circuit faithfully applied this Court's precedents in rendering the fact-specific determination that this case meets the "inherently transitory" exception to the mootness doctrine.

In *Gerstein*, this Court developed the "inherently transitory" exception to the mootness doctrine – which is applied to cases where class membership is characterized by such brevity that a district court cannot reasonably be expected to rule on a class motion before the expiration of any plaintiff's individual claim – in the context of an action brought by a class of county jail inmates. 420 U.S. at 111 n.11. This Court subsequently applied this exception in the context of a policy permitting judicial review of exceptions to masters' proposed findings of nondelinquency, *see Swisher v. Brady*, 438 U.S. 204, 213 n.11 (1976), and in the context of an allegedly impermissible delay in the provision of probable cause hearings, *see County of Riverside v. McLaughlin*, 500 U.S. 44, 51-52 (1991). With near universality, the lower courts have recognized that the claims of county jail inmates are of such inherently brief duration that prosecuting an action for injunctive relief would become nearly impossible absent the *Gerstein* doctrine.[1] The Seventh

---

[1] *See, e.g.*, *Marcera v. Chinlund*, 565 F.2d 253, 255 (2d Cir. 1977) (*per curiam*); *Zurak v. Regan*, 550 F.2d 86, 91-92 (2d Cir. 1977); *McGill v. Parsons*, 532 F.2d 484, 488 & n.5 (5th Cir. 1976); *Jones v. Diamond*, 519 F.2d 1090, 1097-99 (5th Cir. 1975); *Richardson v. Monroe County Sheriff*, No. 1:08-CV-0174, 2008 WL 3084766, at *3 (S.D. Ind. Aug. 4, 2008); *Vandehey v. Vallario*,

(Continued on following page)

Circuit – which had before it both specific facts concerning the average duration of an inmate's incarceration at Tippecanoe County Jail and specific facts concerning the named plaintiff's stay at the jail – thus faithfully and unsurprisingly applied this doctrine to the case at bar.

In arguing that the Seventh Circuit impermissibly expanded the inherently transitory exception of *Gerstein* and its progeny, *see* Pet. 5-7, the Sheriff asserts that that court erred in "focus[ing] on the uncertainty faced by any particular claimant at the outset" of the case rather than "examining generically the duration of the type of class claim asserted by the plaintiff." Pet. 6. Of course, this argument – to the extent that it is anything other than an argument over semantics – is foreclosed by the plain language of *Gerstein* itself, which directs that the focal point of an inherently transitory claim be this very uncertainty:

No. 06-CV-01405, 2008 WL 697428, at *10-11 (D. Colo. Mar. 13, 2008); *Kazarov v. Achim*, No. 02-C-5097, 2003 WL 22956006, at *3 (N.D. Ill. Dec. 12, 2003); *Jane B. v. New York City Dep't of Soc. Servs.*, 117 F.R.D. 64, 67-69 (S.D.N.Y. 1987); *Faheem-El v. Klincar*, 600 F.Supp. 1029, 1035 (N.D. Ill. 1985); *Arrango v. Ward*, 103 F.R.D. 638, 639-40 (S.D.N.Y. 1984); *Coleman v. Stanziani*, 570 F.Supp. 679, 682 & n.2 (E.D. Pa. 1983); *Green v. Johnson*, 513 F.Supp. 965, 974-75 (D. Mass. 1981); *Tucker v. City of Montgomery Bd. of Comm'rs*, 410 F.Supp. 494, 501-02 (M.D. Ala. 1976); *Dillard v. Pitchess*, 399 F.Supp. 1225, 1226 (C.D. Cal. 1975); *Mudd v. Busse*, 68 F.R.D. 522, 532 (N.D. Ind. 1975), *on reconsideration on other grounds*, 437 F.Supp. 505 (N.D. Ind. 1977), *aff'd*, 582 F.2d 1283 (7th Cir. 1978).

> The length of pretrial custody cannot be ascertained *at the outset*, and it may be ended at any time by release on recognizance, dismissal of the charges, or a guilty plea, as well as by acquittal or conviction after trial. *It is by no means certain that any given individual, named as plaintiff*, would be in pretrial custody long enough for a district court to certify the class.

Gerstein, 420 U.S. at 111 n.11 (emphasis added). This holding can also be garnered from this Court's application of the *Gerstein* doctrine to the plaintiffs' claims in *Swisher*, 438 U.S. at 213 n.11 ("Here the rapidity of judicial review of exceptions to masters' proposals creates mootness questions with respect to named plaintiffs, and even perhaps with respect to a series of intervening plaintiffs appearing thereafter, 'before the district court can reasonably be expected to rule on a certification motion.'") (quoting *Sosna v. Iowa*, 419 U.S. 393, 402 n.11 (1975)).

In neither *Gerstein* nor *Swisher* did the apparent dearth of evidence concerning the length of a claim's viability present any roadblock to the invocation of the inherently transitory exception by this Court. To the contrary, the proper focal point is (a) on whether the duration that any individual's claim will remain extant "can[] be ascertained at the outset" of litigation and (b) on whether it is likely that the class will not be certified before any individual's claims are rendered moot. *Gerstein*, 420 U.S. at 111 n.11; *see also Olson v. Brown*, 594 F.3d 577, 582 (7th Cir. 2010).

Given that approximately half of the inmates of Tippecanoe County Jail do not remain in the jail for longer than three (3) months and that uncertainty naturally exists as to which inmates will remain incarcerated for lengthier periods of time, this case represents the paradigmatic instance in which the application of the *Gerstein* doctrine is appropriate.[2]

Moreover, the Sheriff's assertion that the Seventh Circuit "analyz[ed] a particular individual's claim instead of the [class's] claim generally," *see* Pet. 7-11, is belied by that court's decision itself. In determining that the claims in the present case were eligible for the benefit of the inherently transitory exception, the Seventh Circuit repeatedly referenced the nature of the class as a whole, and its decision was in no way limited by Mr. Olson's particular circumstances. *See Olson*, 594 F.3d at 582 ("First, based on the stipulated facts, it is uncertain that any potential plaintiff *in the class of inmates* would have a live claim long enough for a district court to certify a class.") (emphasis added); *id.* at 583 ("An individual

---

[2] Tellingly, an empirical study conducted during the 1990s revealed that, in four (4) federal district courts, the median time for ruling on a class motion ranged from 2.8 months in one district to 8.5 months in another. Thomas E. Willging et al., *An Empirical Analysis of Rule 23 to Address the Rulemaking Challenges*, 71 N.Y.U. L. REV. 74, 102 (1996). More than a quarter of decisions on class motions were issued after the passage of 7.6 months following their filing in the most efficient of the four (4) districts; in the least efficient, a quarter of decisions were still not rendered 15.8 months following the filing of the class motion. *Id.*

incarcerated in a county jail may be released for a number of reasons that he cannot anticipate."); *id.* at 584 ("[W]e find that the *claim* is of the kind that is unlikely to be able to be certified before it becomes moot.") (internal quotation omitted) (emphasis added).

The Sheriff thus ignores entirely the commonsense notion that the application of the inherently transitory exception to particular circumstances presents a fact-specific inquiry that was faithfully undertaken in this case. Indeed, his argument simultaneously encourages the resort to litigation without adequate factual or legal investigation and would make eminently more difficult the prosecution of any claim challenging conditions of confinement in the county jail setting. On the one hand, the short thirty-nine (39) day delay between the named plaintiff's exhaustion of the grievance system on November 24, 2008, and the filing of a complaint on January 2, 2009, can easily be explained by the need for the plaintiff to recruit counsel and the need for counsel to engage in proper investigation.[3] And on the other, to

---

[3] The Seventh Circuit concluded that "the period of time between the first possible day [the plaintiff] could file and the day he actually filed was only fifty-two days." *Olson*, 594 F.3d at 593. This conclusion was erroneous, and takes into consideration the thirteen-day period within which the plaintiff's individual claim was live after his complaint was filed. It is undisputed that Mr. Olson's last grievance appeal was filed on November 7th, and that this grievance was not deemed denied pursuant to the grievance policy of the Tippecanoe County Jail until fifteen

(Continued on following page)

the extent that *Gerstein* demands an examination of the likelihood that the claims of any individual will remain extant "long enough for a district court to certify the class," 420 U.S. at 111 n.11, the presentation of a contested class motion to the district court in a form that is ripe for adjudication oftentimes requires significant briefing or time-consuming discovery addressed to the class issue that would be undertaken only beneath the specter of any named plaintiff's impending release.[4]

Of course, the two (2) "main elements" that the Seventh Circuit focused on "for the 'inherently transitory' exception to apply," *see Olson*, 594 F.3d at 582 – that it be uncertain that the claim of any individual will remain live long enough for a ruling on class certification, and that there exist a constant class of persons suffering the alleged deprivations –

---

(15) days later, or on November 24th (November 22nd was a Saturday). The period of time between November 24th and the date on which the plaintiff's complaint was filed – January 2nd – is only thirty-nine (39) days.

[4] In the present case, for instance, given that the Sheriff denied the existence of any of the practices or policies challenged in the complaint, the plaintiff was required – over the Sheriff's opposition – to obtain leave of court to contact the unnamed members of the class, a process that resulted in the submission of numerous affidavits attesting to the existence of the challenged policies. *See Olson*, 594 F.3d at 584; *cf. Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 157-58 (1982) (holding that a plaintiff must establish the existence of a class of similarly situated persons rather than rely only on the allegations in his complaint).

are those that are explicit in *Gerstein* itself. The Sheriff's purported "expansion" of the *Gerstein* doctrine is thus not an expansion of that doctrine but simply an acknowledgment that the facts of any particular case may yield different results under this Court's established test. The Seventh Circuit faithfully applied this Court's precedents in determining that the plaintiff could reap the benefit of the inherently transitory exception to mootness, and the fact that the Sheriff is not satisfied with that court's proper application of *Gerstein* and its progeny does not yield an issue worthy of certiorari.[5]

---

[5] Given that neither case concerned the inherently transitory exception to mootness, the Sheriff's reliance on *Weinstein v. Bradford*, 423 U.S. 147 (1975), and *Board of School Commissioners of City of Indianapolis v. Jacobs*, 420 U.S. 128 (1975) (*per curiam*), Pet. 9, is both confusing and inappposite. In each of these cases, this Court concluded only that a class was never properly certified – and the class issue was not pressed on appeal – and thus the mooting of the named plaintiffs' claims rendered the cases as a whole moot. *Weinstein*, 423 U.S. at 147-49; *Jacobs*, 420 U.S. at 129-30. Moreover, the Sheriff's purported "[e]roding of the case or controversy requirement," notwithstanding this Court's repeated affirmation of *Gerstein*'s exception to the mootness doctrine, relies only on dissenting opinions in cases not concerning the exception at issue in this case: the right of a since-moot plaintiff to press the denial of class certification on appeal, *see U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 412-13 (1980) (Powell, J., joined by Burger, C.J., and Stewart and Rehnquist, JJ., dissenting); and the ability of a class action defendant to intentionally render a case moot by tendering to the named plaintiffs the maximum they could have recovered on their individual claims, *see Deposit*

(Continued on following page)

II. There is no conflict amongst the circuits regarding the application of the "inherently transitory" exception, and the Sheriff's attempt to create one reveals only the common-sense conclusion that the application of this Court's clear and unequivocal test will result in different outcomes when invoked in different factual settings.

The Sheriff's attempt to drum up a circuit split where none exists, *see* Pet. 12-19, necessarily fails. No court has questioned the clear command of *Gerstein* and its progeny, nor have the lower courts experienced any difficulty applying this Court's established test (a fact attested to additionally by the relative dearth of circuit court opinions addressing the inherently transitory exception). Indeed, the decisions relied upon by the Sheriff from the First, Fifth, Eighth, and Ninth Circuits stand only for the unsurprising proposition that the evaluation of the transitory nature of any claim must be resolved by resort to the facts of the case as presented to the court. This was acknowledged by the Seventh Circuit in the present case, which explicitly noted that its determination was "based on the stipulated facts." *Olson*, 594 F.3d at 582.

The First Circuit, for instance, determined that a putative class action in which the plaintiffs challenged

---

Guar. Nat'l Bank v. Roper, 445 U.S. 326, 353 (1980) (Powell, J., joined by Stewart, J., dissenting). Pet. 9.

delays in the processing of petitions for permanent residence was ineligible for the benefit of the inherently transitory exception simply because there was no showing "that the generic types of claims that they seek to pursue are likely to evade review." *Cruz v. Farquharson*, 252 F.3d 530, 535 (1st Cir. 2001).[6] Indeed, the claims of the named plaintiffs themselves were live for more than twenty-two (22) *months* before they sought judicial redress – a far cry from the thirty-nine (39) *days* within which the present plaintiff could have brought suit – and the plaintiffs' allegations that their petitions were processed only to evade review "constitute[d] too frail a foundation to support th[is] conclusion." *Id.* Although the Sheriff attempts to find relevance in the First Circuit's requirement that a plaintiff "show that the claims generally could not be expected to endure long enough for a district to rule on a motion for class certification,"

---

[6] Of the cases relied upon by the Sheriff to establish a circuit split, *Cruz* is the only one that post-dates the enactment of the Prison Litigation Reform Act of 1997. To the extent that the fact-specific manner in which the transitory nature of any claim is affected by the ability of an inmate-plaintiff to have brought suit earlier than he did, *see Olson*, 594 F.3d at 593 (scrutinizing "the period of time between the first possible day [the plaintiff] could file [his lawsuit] and the day he actually filed"), this analysis is clearly affected by the present inability of such a plaintiff to bring his action prior to the exhaustion of a jail's internal grievance system – a process that may take several weeks, a month, or more. *See* 42 U.S.C. § 1997e(a). In that manner, the Sheriff's repeated reference to the 139-day window within which an average inmate of the Tippecanoe County Jail might file suit is misleading.

Pet. 15, this is the precise requirement announced by the Seventh Circuit in this case and the precise requirement established by *Gerstein*. The fact that the plaintiffs in *Cruz* failed to meet their factual predicate does not in any way inhibit the application of the inherently transitory exception in a case where that predicate has been met.[7]

The Sheriff's reliance on the Ninth Circuit's decision in *Wade v. Kirkland*, 118 F.3d 667 (9th Cir. 1997), suffers from a similar fallacy. In that case, the named plaintiff's claims were rendered moot while his class motion was pending, and the district court thereafter denied the class motion as "premature" and subsequently dismissed the case as moot. *Id.* at 669. Noting first that the plaintiff could press the class issue on appeal notwithstanding the dismissal of the underlying complaint pursuant to this Court's decision in *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 404 (1980), the Ninth Circuit concluded only that

---

[7] The Sheriff's reliance on the First Circuit's decision in *Cruz* in order to create a purported circuit split is inapposite for another reason. Throughout the present litigation, neither party has contested that for a plaintiff to benefit from the inherently transitory exception to mootness a named plaintiff must file his complaint *and* his class motion prior to the expiration of his individual claims. If this is not accomplished, the case is "dead on arrival, moot the day the complaint was filed." *Holmes v. Fisher*, 854 F.2d 229, 232 (7th Cir. 1988). However, in *Cruz* the individual claims of the named plaintiffs were rendered moot approximately ten (10) weeks before class certification was even sought. 252 F.3d at 532-33. As such, the plaintiffs were ineligible for the benefit of the *Gerstein* doctrine in the first place.

the district court was required to evaluate the propriety of applying the inherently transitory exception to mootness before dismissing the case altogether. The court's subsequent remand to the district court to cure the fact that "the record . . . is devoid of any evidence" concerning the transitory nature of the plaintiff's claims, 118 F.3d at 670 – that is, to establish the factual predicate that the Seventh Circuit found present in this case – is of course a far cry from the circuit split that the Sheriff insists is present.[8]

The Eighth Circuit case relied upon by the Sheriff does not stand, as the Sheriff insists, for the broad proposition that a case involving both pretrial detainees and convicted inmates does not qualify for the inherently transitory exception. Rather, the only flaw noted by that court was that the named plaintiffs had "failed to present evidence that the . . . proposed class claims are 'capable of repetition, yet evading review.'" *Inmates of Lincoln Intake &*

---

[8] The Sheriff reads *Kirkland* as establishing the rule that "it [is] up to the district court, not the circuit court, to determine whether a claim [is] 'inherently transitory' within the meaning of *Gerstein*." Pet. 17. However, remanding a case to the district court for the development of a factual record and for the opportunity to render a decision on a previously passed-upon issue in the first instance – as the Ninth Circuit did – does not obviate the well-established principle that after a district court issues such a determination mootness questions predicated on undisputed facts are reviewed by appellate courts *de novo*. *Kirkland*, 118 F.3d at 669 ("Mootness is a question of law reviewed de novo."); *see also Olson*, 594 F.3d at 580 ("Whether a case is moot is a question of law which we review de novo.").

Detention Ctr. v. Boosalis, 705 F.2d 1021, 1024 (8th Cir. 1983); *see also id.* at 1024 n.2 ("There has been no *showing* in the case before us of a similar obstacle to class certification.") (emphasis added). Moreover, the Sheriff's bright-line distinction between "pretrial detainees" and "convicted inmates" is non-existent in the case at bar, where even those class-members who have been convicted of their crimes are simply awaiting transfer to another facility (and the concomitant mooting of their individual claims). *See Olson*, 594 F.3d at 583 (The plaintiff's "transfer by the Indiana Department of Correction . . . illustrates one such unpredictable occurrence that could unexpectedly moot a claim for a county jail inmate.").

In *Rocky v. King*, 900 F.2d 864 (5th Cir. 1990), the Fifth Circuit similarly evaluated the facts of the plaintiff's claim and refused to apply the inherently transitory exception because "[u]nlike the named plaintiffs in *Gerstein*, [the plaintiff] is challenging conditions of long-term, not short-term, confinement." *Id.* at 870. That is obviously not the case presently, and the Sheriff's insistence that a circuit split exists simply because the same test applied to independent factual backdrops produces different results is without merit. Indeed, the Fifth Circuit in *Rocky* explicitly distinguished the case before it – in which a *pro se* plaintiff challenged the conditions of long-term confinement – with a case challenging conditions of confinement in a county jail. *See id.* at 870 n.5 (citing *Cruz v. Hauck*, 627 F.2d 710 (5th Cir. 1980)). After all, "confinement in a jail is by nature temporary." *Hauck*,

627 F.2d at 716; *see also Bell v. Wolfish*, 441 U.S. 520, 526 & n.5 (1979) (describing "the temporary nature of confinement at [a county jail]," even when the jail served to house "pretrial detainees and sentenced prisoners alike").[9]

In *Gerstein* and its progeny, this Court has spoken with a clear voice. Over the past thirty-five (35) years, the lower courts have applied the resultant doctrine faithfully. The mere fact that courts in some cases found the inherently transitory exception to mootness applicable while courts in other cases have not bespeaks not a circuit split but the nature of litigation: differing facts viewed under the same legal lens will oftentimes yield different results. Certiorari is not warranted in this case.

---

[9] The Sheriff's reliance on the Fourth Circuit's decision in *Clay v. Miller*, 626 F.2d 345 (4th Cir. 1980), to establish a circuit split is even more far-fetched. In that case, the district court denied class certification and the issue was not pressed on appeal. Under *Geraghty*, this fact alone warranted the dismissal of the plaintiff's injunctive claim. 445 U.S. at 404 ("A named plaintiff whose claim expires may not continue to press the appeal on the merits until a class has been properly certified.").

CONCLUSION

The petition should therefore be denied.

Respectfully submitted,

GAVIN M. ROSE
Counsel of Record
KENNETH J. FALK
ACLU OF INDIANA
1031 E. Washington St.
Indianapolis, IN 46202
Ph: 317/635.4059, x106
Fax: 317/635.4105
grose@aclu-in.org

RECORD
AND
BRIEFS

No. 09-1316

Supreme Court, U.S.
FILED
MAY 27 2010
OFFICE OF THE CLERK

In The
Supreme Court of the United States

TRACY BROWN,
Petitioner,

v.

JEFFREY MARK OLSON,
Respondent.

On Petition for a Writ of Certiorari
To the United States Court of Appeals
for the Seventh Circuit

PETITIONER'S REPLY BRIEF

Douglas J. Masson
Counsel of Record for Petitioner
P.O. Box 99
Lafayette, Indiana 47902
(765) 423-5404
djm@hlblaw.com

Library of Congress
Law Library

LEGAL PRINTERS, LLC, Washington DC • 202-747-2400 • legalprinters.com

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF CITED AUTHORITIES ii

ARGUMENT 1

CONCLUSION 10

TABLE OF CITED AUTHORITIES

CASES

Cruz v. Farquharson, 252 F.3d 530 (1st Cir. 2001) 2, 3, 4, 6

Gerstein v. Pugh, 420 U.S. 103 (1975) 5

Holmes v. Pension Plan of Bethlehem Steel Corporation, 213 F. 3d 124 (3d Cir. 2000) 2

Inmates of Lincoln Intake and Detention Center v. Boosalis, 705 F.2d 1021 (8th Cir. 1983) 7

Lusardi v. Xerox Corporation, 975 F.2d 964 (3d Cir. 1992) 1

Olson v. Brown, 594 F.3d 577 (7th Cir. 2010) 5

Rocky v. King, 900 F.2d 864 (5th Cir. 1990) 6, 7

Sosna v. Iowa, 419 U.S. 393 (1975) 2

OTHER AUTHORITIES

Jean Wegman Burns, *Standing and Mootness in Class Actions: A Search for Consistency*, 22 U.C. DAVIS L. Rev. 1239 (1988 - 1989) 4

OTHER AUTHORITIES (continued)

Thomas E. Willging, et al, "Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules," Federal Judicial Center (1996) 8

Daniel A. Zariski, et. al., *Mootness in the Class Action Context: Court Created Exceptions to the 'Case or Controversy' Requirement of Article III*, 26 The Rev. of Litigation 77 (Winter 2007) 4, 5

ARGUMENT

Contrary to Respondent's assertion, the scope of the inherently transitory exception to pre-certification mootness in the class action context is unclear, and the Circuits have been far from uniform in their application of that exception.

According to the Respondent, the proper inquiry for application of the exception is for the court to ascertain: 1) whether the duration of a named plaintiff's claim is uncertain at the outset; 2) whether any individual's claim is likely to be rendered moot prior to class certification; and 3) whether there is a constant class of persons subject to the alleged deprivations. *See* Brief in Response at 6, 9. If such clarity and uniformity exist, one would expect the case law to demonstrate attention to these questions and, where answered in the affirmative, the cases proceeding despite the plaintiff's lack of an ongoing personal stake in the subject matter.

However, the approaches are not uniform. The Third Circuit recognizes this explicitly. The Third Circuit looks to whether the named Plaintiff has a personal stake at the time the motion for class certification is filed. If the class is ultimately certified, the certification will be deemed to "relate back" to the date the motion for certification was filed, regardless of whether the named plaintiff lost his personal stake in the interim. *Lusardi v. Xerox Corporation*, 975 F.2d 964, 977 fn 19, 982 fn 32 (3d Cir. 1992). The Third Circuit

recognized that "other courts do not share this view."[1] *Id. See also Holmes v. Pension Plan of Bethlehem Steel Corporation*, 213 F. 3d 124, 135 (3d Cir. 2000) ("So long as a class representative has a live claim at the time he moves for class certification, neither a pending motion nor a certified class action need be dismissed if his individual claim subsequently becomes moot.")

The clarity and uniformity of the "inherently transitory" exception as described by Respondent is not apparent in the First Circuit's decision of *Cruz v. Farquharson*, 252 F.3d 530 (1st Cir. 2001). That case involved a challenge to "the manner in which the Immigration and Naturalization Service (INS) processes (or fails to process) petitions by citizens requesting permanent residence in the United States for their alien spouses." *Id.* at 531. The petitions of the named plaintiffs had all been filed prior to January 1, 1998 and yet, some twenty months later when the plaintiffs filed suit on August 18, 1999, no action had been taken by the INS.[2] However, by October 29, 1999,

---

[1] Indeed, nothing in the Supreme Court cases or Trial Rule 23 attaches significance to the filing of the motion for class certification. Actual certification is the legally significant moment. *Sosna v. Iowa*, 419 U.S. 393, 399 fn. 8 (1975). ("When the District Court certified the propriety of the class action, the class of unnamed persons described in the certification acquired a legal status separate from the interest asserted by appellant. . . . The certification of a suit as a class action has important consequences for the unnamed members of the class.") If relation back is appropriate, the relation back is to the date of the complaint, not the date of the class certification motion. *Id.* at 402 fn. 11.

[2] Respondents characterize the *Farquharson* claims as being live for twenty-two months, apparently presuming a cause of action arising at the time their petition was filed rather than giving the INS some amount of

all of the named plaintiffs' petitions had been resolved. The elements of inquiry identified by the Respondents would have to be answered in the affirmative by the First Circuit. There was undoubtedly a constant class with "literally thousands of similarly situated individuals who have IRV petitions and/or residency applications pending in the INS's Boston office." *Id.* at 536, fn. 6. None of the named plaintiffs could know the duration of their claim at the outset; the duration was substantially at the discretion of the INS and, in any event, not of a certain duration or in the control of the named plaintiffs. And, the mooting of the cases of the four named plaintiffs within a three month period after the lawsuit was filed demonstrated that any given individual was not certain to have a claim long enough for a district court to certify the class prior to the claim becoming moot. And yet, despite the fact that the elements identified by the Respondent were present, the First Circuit concluded the inherently transitory exception was not available and dismissed the matter as moot.

The reason for the First Circuit's conclusion, even in the face of the elements highlighted by Respondent, is that the scope of the "inherently transitory" exception is not so clear nor its application so uniform as the Respondent suggests. The First Circuit found significant that the claims

---

time to process the petitions before the delay became actionable. Brief of Respondent at 12. By contrast, Respondent urges that Mr. Olson's claim for prospective injunctive relief should not begin on the date he became subject to the policies of the Tippecanoe County Jail, but rather, allowances should be made for Mr. Olson to actually suffer harm from the objectionable practices before beginning the grievance process and, once exhausted, recruit legal counsel and engage in factual and legal investigation. Brief of Respondent at 8, fn.3.

themselves were not inherently of a type likely to escape review and dismissed on that basis. *Id.* at 535. The plaintiffs' individual experiences, even coupled with the presence of thousands of similarly situated individuals and even though no given plaintiff could know the duration of his or her claim in advance, were not enough to demonstrate that the claims generally were inherently transitory such that the personal stake requirement could be abandoned. *Id.*

Petitioner is not the first to observe this confusion. One scholar described the Supreme Court's approach to standing and mootness in the class action context as fluctuating between formalistic and functional approaches, resulting in lower court decisions that have become "a confused and conflicting morass." Jean Wegman Burns, *Standing and Mootness in Class Actions: A Search for Consistency*, 22 U.C. DAVIS L. Rev. 1239, (1988 - 1989) (particularly reviewing pre-certification mootness issues at 1263-1269.) More recently, lower court decisions have been characterized as "fractured" over the boundaries of mootness in the class action context. Daniel A. Zariski, et. al., *Mootness in the Class Action Context: Court Created Exceptions to the 'Case or Controversy' Requirement of Article III*, 26 The Rev. of Litigation 77, 85 (Winter 2007).

Zariski suggests that the Supreme Court has yet to speak definitively on the impact of the mooting of a named plaintiff's claim before class certification, leading to significant disagreement among and within circuit courts and to four broad approaches to the question: 1) a strict approach mandating dismissal if a named plaintiff's claims become moot prior to certification; 2) a narrow, inflexible exception allowing an action to proceed to class certification so long as

a certification motion has been filed prior to mooting of a named plaintiff's action; 3) an expansive approach where a case is allowed to proceed even where it becomes moot prior to filing of a class certification motion; and 4) the approach of the 9th Circuit which Zariski describes as "ad hoc." *Id.* at 85.

Much of the confusion with respect to the "inherently transitory" exception stems from the Supreme Court's ambiguous use of the phrase "any given individual," *Gerstein v. Pugh*, 420 U.S. 103, 110 fn. 11 (1975) ("It is by no means certain that any given individual, named as plaintiff, would be in pretrial custody long enough for a district judge to certify the class.")

In its more inclusive meaning, with emphasis on "given," the phrase "any *given* individual" indicates that, unless a particular person could be certain in advance that his personal claim would endure long enough for the district court to certify the class, the claim would not be mooted. This is the meaning that the Seventh Circuit seems to have taken. *Olson v. Brown*, 594 F.3d 577, 582 (7th Cir. 2010) (Petitioner's App. 9) ("the essence of the exception is uncertainty about whether a claim will remain alive for any given plaintiff long enough for a district court to certify the class. . . the crux of the 'inherently transitory' exception is the uncertainty about the length of time a claim will remain alive.") Given that the parties stipulated that a representative jail population consists of at least forty-one (41) inmates subject to the jail's policies for in excess of a year, the presence at the jail of inmates whose claims would endure through class certification is certain. It is their particular identity in advance that may be uncertain. Application of the inherently transitory exception makes sense in Olson's case

if mootness applies only where there is certainty, in advance, about an individual inmate's claim.

More restrictively, with emphasis on "any," the phrase "*any* given individual" indicates that, before the 'inherently transitory' exception applies, there must be uncertainty as to whether the type of claim would persist long enough for anybody at all to allow for a ruling on class certification. This is the meaning that the First Circuit seems to have taken. *Cruz v. Farquharson*, 252 F.3d 530, 535 (1st Cir. 2001) ("[T]he plaintiffs have not shown at this juncture that the generic types of claims that they seek to pursue are likely to evade review . . . . the plaintiffs' experience, in and of itself, constitutes too frail a foundation to support the conclusion that [the claims are inherently transitory.]") As the First Circuit put it, "one swallow does not a summer make." *Id.*

The First Circuit is not the only circuit to dismiss as moot a case where the duration of the plaintiff's claim was uncertain at the inception of the case, where there was uncertainty as to which particular claimant could maintain the claim through class certification, and where there was a class of similarly situated individuals.

In the Fifth Circuit case of *Rocky v. King*, an inmate complained of the conditions of field labor at the prison. At the inception of his case, he could not be certain how long he would be assigned to field work and, indeed, due to health concerns, he was removed from the fields prior to class certification. Any of the other inmates could have found their claim mooted by health concerns, unilateral action of prison officials, or other happenstance. There would be no way to

know in advance which inmates, if any, were certain to remain assigned to field work from the date their complaint was filed until the date of class certification. The presence of these factors notwithstanding, the Fifth Circuit saw the need to vacate the district court's entry of judgment against the plaintiff, and remand it for dismissal as moot. Despite the uncertainties, the Fifth Circuit recognized the existence of other potential champions for claims of this type, and saw no indication they would all be removed from field work prior to class certification. *Rocky v. King*, 900 F.2d 864, 870-871 (5th Cir. 1990) ("Hundreds of inmates at Angola apparently work in the fields and could file a claim identical to that filed by Rocky. There is no indication that Angola officials will remove such inmates from field work before a district court rules on class certification in order to render that claim moot.")

The Eighth Circuit case of *Inmates of Lincoln Intake and Detention Center v. Boosalis*, 705 F.2d 1021 (8th Cir. 1983) was a challenge to conditions at a Nebraska county jail. As county jail inmates, they could have no greater certainty than Mr. Olson about the duration of their claim and whether any given inmate would have a live claim long enough for class certification. That notwithstanding and despite a constant class of other inmates, the Eighth Circuit reached a result opposite from the Seventh Circuit in this case. The Eighth Circuit held that the plaintiff was required to make a showing that, absent relation back, the claims would evade review. Unlike the pretrial detainees in *Gerstein* awaiting a probable cause hearing, the presence of pretrial detainees and convicted inmates meant that evasion of review could not be taken as given. *Id.* at 1024, fn 2.

Mr. Olson claims that he has made such a showing through the stipulated facts. Brief in Opposition at 11, 13. The district court certainly did not believe so, finding it significant that 30% of the jail population is incarcerated for more than half a year. (Petitioner's App. 25). The stipulated facts did not establish that claims of the type advanced by Mr. Olson would evade review if class certification were not allowed to relate back to the filing of the complaint. They established only that a representative snapshot of the jail population consisted of 529 inmates with an average incarceration of 139 days. Of these, 128 had been incarcerated for less than 30 days, 119 between 31-90 days; 130 between 91-180 days; 121 between 181-365 days; and 41 for more than a year.

Mr. Olson attempts to bolster his position that these time frames are too short to allow for class certification by citing to a 1996 class action study by Thomas Willging collecting information about class action lawsuits in four district courts. Brief in Opposition at 7, fn. 2. The study is, at best, of indifferent assistance to Mr. Olson and, more likely, undermines his position. According to Mr. Willging, the average time to rule on class certification once a motion was filed was 2.8 months in the Northern District of California, 3.8 months in the Northern District of Illinois, 4.1 months in the Eastern District of Pennsylvania, and 8.5 months in the Southern District of Florida. Thomas E. Willging, et al, "Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules," Federal Judicial Center (1996) at page 120, figure 20. These are averages which may or may not have been representative samples of the federal judiciary as a whole in 1996, and the study includes no allowance for the possibility

of an expedited ruling where a district court is advised of a pressing need. Regardless, the inmates at the Tippecanoe County Jail for over a year could easily meet such deadlines as could some portion of those incarcerated for over six months. At the time of his ruling in this matter, Judge Sharp certainly would have been familiar with the possible time frames for a class certification ruling in the Northern District of Indiana.

At the heart of the "inherently transitory" exception is a desire that a claim not forever go without review because of application of mootness principles. The claims advanced by Mr. Olson relate to conditions of confinement at the Tippecanoe County Jail; complaints that are not any more or less transitory than other claims involving conditions of confinement at county jails. District courts are frequently called upon to address these issues and are generally able to do so without mootness concerns interfering. Mr. Olson does not present a special situation requiring application of the exception. Rather, this Court should review the Seventh Circuit's decision to ensure that the exception is limited to meet the need for which it was crafted and that the limitations imposed by Article III, §2 of the United States Constitution are properly observed.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

Douglas J. Masson
Counsel of Record
HOFFMAN, LUHMAN & MASSON, PC
P.O. Box 99
Lafayette, Indiana 47902
Telephone: (765) 423-5404
Facsimile: (765) 742-6448
E-mail: djm@hlblaw.com